UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

OXARC, INC.,	:	
	:	
and	:	CASES 19-CA-230472; 19-CA-237336;
	:	19-CA-237499; 19-CA-238503;
	:	19-CA-232728; 19-CA-248391
TEAMSTERS LOCAL 839,	:	
	:	
and	:	
	:	
TEAMSTERS LOCAL 690,	:	
	:	
and	:	
	:	
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,	:	
	:	
and	:	
	:	
JARED FOSTER, an individual.	:	

RESPONDENT/EMPLOYER OXARC, INC.'S REQUEST TO THE NATIONAL LABOR RELATIONS BOARD FOR SPECIAL PERMISSION TO APPEAL A RULING OF AN ADMINISTRATIVE LAW JUDGE CONCERNING VIRTUAL HEARINGS

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Counsel for Respondent/Employer Oxarc, Inc.

Respondent/Employer Oxarc, Inc. ("Respondent" or "Oxarc"), pursuant to Section 102.26 of the National Labor Relations Board's Rules and Regulations, files this Request for Special Permission to Appeal Administrative Law Judge Ariel L. Sotolongo's Ruling on August 3, 2020, in which the Administrative Law Judge ("ALJ") ruled that a hearing on the above-captioned cases should proceed virtually via *Zoom* video-conferencing .

More specifically, counsel for Respondent moved the ALJ for a postponement of the virtual hearing set for August 3, 2020. In support of Respondent's Motion, Respondent advised the ALJ of the prejudice it would suffer should the hearing proceed virtually. On August 3, 2020, the first day of the hearing, the ALJ denied Respondent's Motion, ruling that the hearing should proceed virtually (hereinafter "the Ruling"). The ALJ made this ruling despite the fact that the Charging Party did not object to Respondent's Motion. However, in light of Respondent's intent to file this request for special permission and interim appeal, the ALJ continued the hearing until the Board rules on the request and appeal.

As detailed in the Respondent's Appeal, the critical issues are as follows: (1) whether the ALJ's ruling requiring Respondent to submit to a hearing via virtual means prejudices and deprives Respondent of a fair trial in violation of Respondent's due process rights; (2) whether there is a good cause shown for a virtual hearing in accordance with 102.35(c) of the Board's Rules and Regulations; (3) whether the ALJ has protected the integrity of the hearing pursuant to 102.35(c) of the Board's Rules and Regulations; (4) whether virtual hearings require procedural mandates that go beyond the rules; (5) whether the ALJ Ruling undermines the requirement that hearings be open to the public; and (6) whether the Charging Party and/or General Counsel is prejudiced by a continuance. A true and correct copy of Respondent's Appeal is attached hereto as Exhibit 1.

WHEREFORE, based on the grounds as set forth in Respondent's Appeal, Respondent respectfully requests that the Board grant special permission to appeal Judge Sotolongo's Ruling.

Respectfully submitted this 7th day of August, 2020.

Respectfully submitted,

s/ Rick Grimaldi

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CERTIFICATE OF SERVICE

Pursuant to Section 102.114 of the Board's Rules and Regulations, I Rick Grimaldi, Esquire, hereby certify that on the 7th day of August, 2020, the foregoing document titled Respondent/Employer Oxarc, Inc.'s Request to the National Labor Relations Board for Special Permission to Appeal a Ruling of an Administrative Law Judge Concerning Virtual Hearings, and any and all accompanying Exhibits was filed electronically and served via e-mail on all parties and counsel of record as follows:

(Via E-File)
Roxanne L. Rothschild
Executive Secretary
National Labor Relations Board
1099 14th St. N.W.
Washington, DC 20570

(Via E-Mail)
The Honorable Ariel L. Sotolongo
Administrative Law Judge
National Labor Relations Board
Division of Judges
Ariel.Sotolongo@nlrb.gov

Adam Morrison, Esquire
National Labor Relations Board, Region 19
Adam.Morrison@nlrb.gov

Matthew Harris, Esquire
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Counsel, Teamsters Local 690, Local 839
Jack@rmbllaw.com

/s/ Rick Grimaldi
Rick Grimaldi, Esquire

Exhibit 1

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and	:	
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JARED FOSTER, an individual.	:	

RESPONDENT/EMPLOYER OXARC, INC.'S SPECIAL APPEAL FROM A RULING OF AN ADMINISTRATIVE LAW JUDGE CONCERNING VIRTUAL HEARINGS

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Counsel for Respondent/Employer Oxarc, Inc.

Pursuant to Section 102.26 of the Board's Rules and Regulations, Respondent/Employer Oxarc, Inc. ("Respondent" or "Oxarc"), by and through its undersigned counsel, respectfully enters this Appeal from Administrative Law Judge Ariel L. Sotolongo's Ruling dated August 3, 2020 denying Respondent's Motion to postpone the August 3, 2020 hearing.

I. PROCEDURAL HISTORY AND BACKGROUND

A. Three Consolidated Complaints Over One Year, Four Re-Scheduled Hearings, and the Decision to Conduct the Hearing by Virtual Means

This matter involves a tortured procedural history. Over the course of one year, three consolidated complaints were issued. *See, e.g.*, February 28, 2019 Order Consolidating Cases, Consolidated Complaint, and Notice of Hearing, a true and correct copy of which is attached hereto as Exhibit A (hereinafter "Exhibit A"); June 27, 2019 Order Further Consolidating Cases, Second Consolidated Complaint, and Notice of Rescheduled Hearing, a true and correct copy of which is attached hereto as Exhibit B (hereinafter "Exhibit B"); December 6, 2019 Order Further Consolidating Cases, Third Consolidated Complaint, and Notice of Rescheduled Hearing, a true and correct copy of which is attached hereto as Exhibit C (hereinafter "Exhibit C").

With each new complaint came additional allegations put forward by the General Counsel, as well as a new hearing date. The first complaint, issued February 28, 2019, alleged that (i) Respondent unlawfully discharged Jared Foster ("Foster") for engaging in union-protected activities; and (ii) Respondent interrogated its employees about their feelings concerning Respondent's collective bargaining proposals. *See* Exhibit A. The first complaint detailed that the hearing was to take place beginning July 9, 2019. *See id.* After Respondent had answered the first complaint, on March 14, 2019, it was ordered that the hearing would be re-scheduled from July 9, 2019 to September 25, 2019. A true and correct copy of the Order Rescheduling Hearing is attached hereto as Exhibit D (hereinafter "Exhibit D"). Thereafter, on June 27, 2019, the second

amended complaint was issued. *See* Exhibit B. Therein, the General Counsel added the following allegations: (i) Respondent declared impasse without first bargaining in good faith to impasse; and (ii) Respondent implemented a last, best, and final offer ("LBFO") without reaching a lawful impasse and unlawfully implemented provisions inconsistent with the LBFO. *See id.* The second amended complaint re-scheduled the hearing to begin on October 15, 2019. Again, after Respondent duly responded to the second amended complaint, the hearing was again re-scheduled – from October 15, 2019 to April 21, 2020. A true and correct copy of the Second Order Rescheduling Hearing is attached hereto as Exhibit E (hereinafter "Exhibit E"). Yet again, on December 6, 2019, the General Counsel amended the complaint. *See* Exhibit C. The following allegation was added: (i) Respondent generally refused to meet with and bargain with the Union following impasse. *See id.* The third amended complaint, we believe, mistakenly, re-scheduled the hearing to take place on May 12, 2019.[1] *See id.*

The Third Amended Consolidated Complaint governs the above-captioned six (6) cases (hereinafter "the Complaint") and is the operative pleading in this matter. *See generally* Exhibit C. To summarize, the Complaint alleges, *inter alia*, that Respondent: (i) interrogated its employees about their feelings concerning collective bargaining proposals; (ii) discharged employee Foster in retaliation for Foster engaging in Union and/or protected concerted activities; (iii) unilaterally changed several workplace policies; (iv) declared impasse without first bargaining in good faith to impasse; (v) implemented a LBFO without reaching a lawful impasse and unlawfully implemented provisions inconsistent with the LBFO; and (vi) generally refused to bargain following the alleged impasse. *See id.*

[1] We attribute this to a mistake because the prior order had already re-scheduled the hearing to take place on April 21, 2020.

Respondent filed its Answer and Affirmative Defenses to the Third Amended Complaint on December 20, 2019 (hereinafter "Answer to Complaint") denying the allegations as set forth in the Complaint. A true and correct copy of Respondent's Answer and Affirmative Defenses is attached hereto as Exhibit F (hereinafter "Exhibit F").

On April 15, 2020, a ***third*** order rescheduling the hearing was issued. A true and correct copy of the Third Order Rescheduling Hearing is attached hereto as Exhibit G (hereinafter "Exhibit G"); *see also* Exhibits A-E. While this Order was labeled "third," the hearing had, in actuality, been re-scheduled four times. *See* Exhibits A-E. All of the re-scheduled hearings were a result of the General Counsel continuing to amend the complaint – necessarily implying that time was not of the essence. The Third Order Rescheduling the Hearing ordered that the matter be scheduled for a hearing to begin on August 4, 2020 "at a place to be determined in Pasco, Washington." *See id.* At the time the Order was issued, the matter was scheduled to take place in person. *See id.*

Subsequently, the parties convened telephonically with the Administrative Law Judge, Judge Ariel L. Sotolongo (hereinafter the "ALJ" or "Judge Sotolongo"), to discuss the prudence of proceeding with the in-person hearing in light of the ongoing COVID-19 pandemic. *See* July 9, 2020 ALJ Order, a true and correct copy of which is attached hereto as Exhibit H (hereinafter "Exhibit H"). During this telephone conference, Judge Sotolongo began by noting the complexity of this matter. Specifically, Judge Sotolongo highlighted that the number of cases involved in this matter and the number of documents at issue would make this matter a less than ideal candidate for a virtual hearing.

Nonetheless, during the teleconference, the parties continued to discuss the practicalities of attempting a virtual hearing. By way of example, the parties generally discussed the anticipated

length of the hearing, agreeing that it would, at minimum, consume the entirety of the week beginning Tuesday, August 4, 2020. Both parties estimated five to six witnesses and two to three days to put on their cases. All parties noted that none had ever participated in a virtual hearing, and certainly not for this length of time. Despite the agreed uncertainty and potential difficulty, in an effort to move forward, the parties collectively agreed to conduct the hearing through a videoconferencing platform called "*Zoom*." *See id.* Citing the "good cause in compelling circumstances" exception of Section 102.35(c)(1) of the Board's Rules and Regulations, the ALJ ordered the hearing to be conducted on August 4, 2020 via *Zoom*. *See id.*

B. <u>Preparing for the Virtual Hearing</u>

Shortly after it was determined that the matter would proceed by *Zoom*, the parties began to prepare for the hearing. It was jointly recognized by both Respondent and Counsel for the General Counsel that, even without considering technical difficulties or the generally slower nature of virtual hearings, the hearing would exceed four (4) business days. Accordingly, the parties jointly moved for the hearing to begin one (1) day earlier – on Monday, August 3, 2020. A true and correct copy of the July 15, 2020 ALJ Order granting the parties' Joint Motion to Change the Hearing Date is attached hereto as Exhibit I (hereinafter "Exhibit I").

The same day the aforementioned Order was issued, Counsel for the General Counsel graciously offered to take the lead on preparing the joint exhibits to be used at the hearing. A true and correct copy of Counsel for the General Counsel's July 15, 2020 correspondence is attached hereto as Exhibit J (hereinafter "Exhibit J"). Counsel for the General Counsel noted that such efforts would be preferred in light of the "voluminous documents" at issue in this matter. *See* Exhibit J.

Exactly two weeks before the hearing was to begin, on July 20, 2020 the ALJ issued an Order outlining the procedures to be utilized during the hearing. A true and correct copy of the July 20, 2020 Pre-Hearing Order is attached hereto as Exhibit K (hereinafter "Exhibit K"). Therein, the ALJ requested that (i) the parties provide all potential exhibits to the ALJ, Courtroom Deputy, witnesses, and opposing parties ***in advance of the hearing***; and (ii) all exhibits be pre-marked, paginated, and converted into a bookmarked .pdf file. *See* Exhibit K. Mindful of the ALJ's Pre-Hearing Order, Counsel for the General Counsel and Counsel for the Respondent worked tirelessly to prepare and compile the joint exhibits for ease of reference at the time of the hearing.

Pursuant to the ALJ's July 9, 2020 Order, a pre-hearing conference was held on July 27, 2020. *See* Exhibit H. Respondent believed, at that time, it would be able to proceed virtually.

As joint exhibits continued to be exchanged for review, Respondent continued to locate additional documents necessary to add. Specifically, this matter relates to collective bargaining for more than ***two years***. Accordingly, there are countless proposals exchanged by the parties, many of which were the same document but with a different bargaining member's notes or some other detail. As a result, it was exceedingly difficult and time consuming to review the documents provided by the General Counsel in an effort to confirm no proposals were missing or whether other versions should be included.

Beyond the task of confirming and agreeing to hundreds of pages of exhibits, the parties were required to re-label and re-bookmark the entirety of the joint exhibits consistent with the ALJ's Pre-Hearing Order. *See* Exhibit K. While Respondent appreciates the General Counsel's efforts to take the lead on compiling the joint exhibits, Counsel for the General Counsel took

multiple days to complete a single component of the joint exhibits. This was repeated for each separate component of the joint exhibits. On one occasion, Counsel for Respondent had to re-do an entire joint exhibit provided by Counsel for the General Counsel because she was having technical difficulties in using the .pdf software. Counsel for the General Counsel did not provide the final joint exhibits until Saturday, less than 48 hours before the hearing. By Sunday evening, Respondent had already identified many additional documents that needed to be incorporated, which would require a complete re-compilation. The joint exhibits, alone, include nearly 1,000 pages and approximately 115 bookmarks.

C. Respondent's Subpoena *Duces Tecum* to Foster and Counsel for the General Counsel's Motion to Amend the Complaint on the Eve of the Hearing

In preparation for the hearing, both parties served various subpoenas. Of relevance here, on July 15, 2020, Respondent served a Subpoena *Duces Tecum*, No. B-1-19NVZAR, on named party and ***former*** Oxarc employee, Jared Foster (hereinafter the "Foster Subpoena"). Following service of the Foster Subpoena, Counsel for the General Counsel filed a Petition to Revoke the Foster Subpoena (hereinafter "Petition to Revoke"). True and correct copies of the Foster Subpoena and Petition to Revoke are attached hereto as Exhibits L and M, respectively (hereinafter "Exhibit L" and "Exhibit M", respectively).

The Petition to Revoke asserts that document request numbers 7 and 10 in the Foster Subpoena are "inappropriate and ***likely*** violate § 8(a)(1) of the Act" and document request number 8 "also ***potentially*** violates § 8(a)(1) of the Act."[2] Exhibit M at pp. 4-6 and fn. 2. On July 21, 2020, the ALJ ordered Respondent to show cause as to why the Petition to Revoke should not be granted. A true and correct copy of the July 21, 2020 Order to Show Cause is attached hereto as Exhibit N

[2] It is noteworthy that Counsel for the General Counsel did not argue that document request number 9 was or could be a violation of § 8(a)(1) of the Act.

(hereinafter "Exhibit N"). Respondent filed its Response to the July 21,2020 Order to Show Cause in Opposition to the Petition to Revoke on July 24, 2020. A true and correct copy of Respondent Oxarc's Response to the July 21, 2020 Order to Show Cause in Opposition to the Petition to Revoke is attached hereto as Exhibit O (hereinafter "Exhibit O"). In short, Respondent explained that where subpoenaed communications between a union and an employee witness for the union are relevant to the employer's case and to the credibility of the employee, the ALJ should not revoke the subpoena in its entirety. *Id.* Rather, the ALJ should require production of responsive information that would not infringe on any confidentiality interests. *Id.* Respondent also confirmed it was ***not*** seeking confidential or privileged documents, nor was it seeking Board affidavits. *Id.*

On July 28, 2020, the ALJ issued an Order granting the Petition to Revoke in part and denying the Petition to Revoke in part (hereinafter the "July 28 ALJ Order"). A true and correct copy of the July 28 ALJ Order is attached hereto as Exhibit P (hereinafter "Exhibit P"). Most notably, the ALJ found that Respondent's requests that the General Counsel claimed were potentially impermissible included *lawful* information. Though argued by Counsel for the General Counsel, the ALJ did not address the question of whether document request numbers 7, 8, and 10, in themselves, are facial violations of the Act. *See generally* Exhibit P.

Prior to receipt of a disposition on the Petition to Revoke, Teamsters Local 839 filed an Unfair Labor Practice Charge (hereinafter "Foster ULP") against Respondent. A true and correct copy of the July 21, 2020 Foster ULP is attached hereto as Exhibit Q (hereinafter "Exhibit Q"). The Foster ULP maintains that document request numbers 7 through 10 of the Foster Subpoena are facial violations of the Act and presents arguments that are nearly[3] mirror-image of Counsel

[3] *See* n. 2, *supra*.

for the General Counsel's Petition to Revoke. *See generally* Exhibit Q. On July 30, 2020, Respondent filed a Position Statement in response to the Foster ULP highlighting that the allegations that form the basis of the Foster ULP had been addressed by the ALJ and were, therefore, moot. A true and correct copy of Respondent's Position Statement to the Foster ULP is attached hereto as Exhibit R (hereinafter "Exhibit R").

On the afternoon of Sunday, August 2, 2020, less than 24 hours before the start of the hearing, Counsel for the General Counsel emailed counsel for Respondent and the ALJ as follows (hereinafter "Counsel for the General Counsel's Motion to Amend"):

> Please allow this email to serve as notice of Counsel for the General Counsel's intent to seek permission to amend the Consolidated Complaint at the opening of the hearing to add the following allegation (copy also attached):
>
> *On about July 15, 2020, Respondent, through its legal counsel, issued Subpoenas Duces Tecum to Jared Foster, Teamsters Local 839, and the International Brotherhood of Teamsters seeking to compel the disclosure of Foster's and other employees' Section 7 activities.*
>
> *By the acts described above, Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in § 7 of the Act in violation of § 8(a)(1) of the Act.*
>
> The allegation is based upon a charge filed by Teamsters Local 839 on July 21, 2020, in Case 19-CA-263356, which the Region decided over the weekend. Accordingly, this allegation arose within the past two weeks, in preparation for this hearing. As Counsel for the General Counsel, it our belief that adding this allegation will not substantially lengthen the hearing or prejudice Respondent, as the facts pertaining to this allegation are likely not to be in dispute. Thus, this issue is primarily a legal one that can be addressed by the parties in their post-hearing briefs.

A true and correct copy of Counsel for the General Counsel's Motion to Amend and accompanying attachment is attached hereto as Exhibit S (hereinafter "Exhibit S") (emphasis in original).

In response, counsel for Respondent advised the ALJ and Counsel for the General Counsel of two key facts: (1) a formal complaint had not yet been issued and (2) because a formal complaint had not yet been issued, Respondent had not been provided an opportunity to respond.[4] A true and correct copy Respondent's August 2, 2020 Response to Counsel for the General Counsel's Motion to Amend and accompanying attachment is attached hereto as Exhibit T (hereinafter "Exhibit T"). Therefore, Respondent argued that Counsel for the General Counsel's Motion to Amend was in direct contravention to Sections 102.15 and 102.20 of the Board's Rules and Regulations. *See* Exhibit T. Further, given that the ALJ had limited the application of the Foster Subpoena, and Respondent had clarified the lawful information it was seeking, the issue is moot.

D. <u>Respondent's Motion to Postpone and the ALJ's Ruling</u>

On the evening of August 2, 2020, Respondent came to the realization that the vast undertaking associated with proceeding with the hearing by virtual means was unworkable. Specifically, counsel for Respondent were unable to access the SharePoint site to be used to upload exhibits, were continuing to find exhibits to be added given the sheer magnitude of two years' worth of negotiations, proposals, and notes, and could not configure a process that would allow for more than one microphone for co-counsel and witnesses in the same room. As a result, counsel for Respondent emailed the ALJ and the parties of record that it would be withdrawing its consent to have the hearing proceed via *Zoom* (hereinafter "Respondent's Motion to Postpone"):

> As a follow-up to our email of earlier today and through the course of our preparations, we have realized the vast undertaking associated with proceeding with this week's hearing by virtual means. By way of one example, while we appreciate that Counsel for the General

[4] On Monday, August 3, 2020, after the start of the hearing, Region 19 Board Agent, Travis Williams, sent an email informing Respondent that the Regional Director late on Friday found merit. However, there was no Complaint issued and to date Respondent has not received a Complaint. A true and correct copy of the foregoing correspondence is attached hereto as Exhibit U (hereinafter "Exhibit U").

> Counsel volunteered to take the lead on compiling Joint Exhibits for the hearing, due to no fault of Respondent, the Joint Exhibits were only finalized as of yesterday, August 3, 2020. In comparing those proposed hundreds of pages with Respondent's own documents, Respondent continues to find additional documents that must be added, even as we sit here now. Re-compiling, marking and bookmarking hundreds of pages of joint exhibits in such a short timeframe is simply unworkable. The number of electronic files, each with a multitude of bookmarks, does not lend itself to virtual presentation.
>
> As recognized by Your Honor in the first pre-hearing conference with the parties, the amount of documents involved in this proceeding makes this case a less than ideal candidate for a virtual hearing. Moreover, the parties agree that this case will take *at least* five days. As we understand it, none of the participants have ever attempted such a feat virtually. Upon our attempts to prepare virtually, it will only take longer. It is therefore likely impossible that we can complete this hearing in one week's time.
>
> As counsel for Respondent has repeatedly made clear, we are zealously representing our client and witnesses; therefore plan to represent them in person during this hearing. As a result, attempting to present multiple participants virtually from a single location is yet another hurdle.
>
> Finally, as illustrated by Your Honor's email a moment ago, we are certain to encounter multiple technical difficulties related to connectivity and accessibility. In fact, counsel for Respondent is unable to access Sharepoint this evening.
>
> In light of the above, Respondent submits that it will be prejudiced should this hearing go forward in a virtual manner. For these reasons, Respondent withdraws its consent to have this hearing conducted via Zoom conference. Accordingly, Respondent requests that the hearing in this matter be continued until a later date when it can safely be conducted in person.

A true and correct copy of Respondent's Motion to Postpone is attached hereto as Exhibit V (hereinafter "Exhibit V"). Ironically, moments before sending the email, the ALJ informed the parties that he was having connectivity issues and was hoping to resolve them in the morning before the hearing commenced.

Later Sunday evening, the ALJ replied to Respondent's Motion to Postpone noting that he would consider both Counsel for the General Counsel's Motion to Amend and Respondent's Motion to Postpone at the start of the August 3, 2020 hearing. A true and correct copy of the ALJ's August 2, 2020 correspondence is attached hereto as Exhibit W (hereinafter "Exhibit W").

E. The ALJ Denies Respondent's Motion to Postpone but Does Not Address Counsel for the General Counsel's Motion to Amend

The first day of the virtual hearing commenced on Monday, August 3, 2020 at approximately 9:00 a.m. A true and correct copy of the August 3, 2020 Hearing Transcript is attached hereto as Exhibit X (hereinafter "Exhibit X"). Judge Sotolongo opened the hearing addressing the virtual nature of the proceeding:

> Because conducting or participating in the Zoom hearing may be new to some, there may be times when things may be -- may move a little slower than they would during an in-person hearing. Technical issues may occasionally arise due to a slow or lost internet connection or other video or audio problems . . . . We are here in uncharted waters.

Exhibit X at pp. 3:22-4:2, 4:9.

Judge Sotolongo then addressed Respondent's Motion to Postpone. *See id.* at p. 6:3-6. Respondent reiterated the same arguments as set forth in its Motion to Postpone. *See id.* at pp. 6:17-9:1.

Following Respondent's argument in support of its Motion to Postpone, Judge Sotolongo solicited input from the Charging Party and Counsel for the General Counsel. *See id.* at p. 9:2-4. Counsel for the General Counsel, not surprisingly, opposed Respondent's Motion to Postpone. *See id.* at p. 9:5-8. In support of its opposition, Counsel for the General Counsel maintained that: (i) virtual hearings are "the wave of the future"; (ii) the parties have already spent time and money

preparing; (iii) co-counsel is pregnant and a continuance will make things "difficult"; and (iv) one of the party representatives, David Jacobson, would be retiring soon. *See id.* at pp. 9:7-10:10.

Conversely, and most importantly, Charging Party ***did not oppose*** Respondent's Motion to Postpone. *See id.* at p. 10:11-22. Counsel for Charging Party noted that a delay would not prejudice its position given the prior delays and further mentioned the level of discomfort in proceeding via virtual means, especially since counsel for Charging Party resides on the east coast. *See id.*

After consideration of the parties' respective positions, the ALJ offered, as a suggestion, for the General Counsel to proceed with its case and then take a recess for the rest of the week so that Respondent could get its exhibits in order and have more time to prepare the technical aspect of the case. *See id.* at pp. 13:21-14:6. Counsel for Respondent explained that the problem was not that they more time to conform to the electronic and technical demands, but that these demands were wholly ineffective for such a complex case, were woefully short of an in-person hearing, and worked against Respondent to the point of depriving it of due process. Accordingly, Respondent declined this offer. *See id.* at p. 19:5-13. As a result, ***the ALJ ruled as follows: "If you object – my ruling will be to continue – my ruling is to continue the hearing via Zoom" (hereinafter "the Ruling").*** *Id.* at p. 20:13-15. The ALJ then detailed the procedure by which Respondent was to appeal to the Board. *See id.* at pp. 20:16-21:6. Respondent represented it would request special permission to appeal from the Board by no later than August 7, 2020. *See id.* at pp. 21:25-22:3. As a result, the ALJ continued the hearing pending the appeal. The ALJ did not rule on the General Counsel's motion to amend the Third Consolidated Complaint.

II. RELEVANT ADMINISTRATIVE RULES AND REGULATIONS

The relevant administrative rules and regulations are included in an Addendum to this Appeal.

III. STANDARD OF REVIEW

The decision to allow trial testimony by videoconference is at the discretion of the administrative law judge. *See Tesla, Inc.*, 32-CA-197020, unpub. Board order issued July 16, 2018 (2018 WL 3436889) (Board allowed special appeal but held the General Counsel had failed to establish that the judge abused her discretion in denying testimony of one witness by videoconference); *see also People v. Casias*, 312 P.3d 208, 213 (Co. 2012) (noting its review of trial court's ruling on use of video conferencing testimony was grounded in an application of the abuse of discretion standard of review).

The abuse-of-discretion standard, however, incorporates *de novo* review of questions of law. *See U.S. v. Carr*, 557 F.3d 93, 103 (2d Cir. 2009); *Alexander v. Glickman*, 139 F.3d 733, 735 (9th Cir. 1998) ("The interpretation and construction of a statute is a question of law reviewed *de novo*."); *Washington Public Utilities Group v. U.S. Dist. Court for Western Dist.*, 843 F.2d 319, 324 (9th Cir. 1987) ("A question of statutory interpretation is a question of law and is *reviewed de novo*.").

IV. ARGUMENT

A. Conducting a Virtual Hearing Will Infringe Upon Respondent's Due Process Rights

The ALJ's basic duty is "to inquire fully into the facts . . . whether the Respondent has engaged in or is engaging in an unfair labor practice affecting commerce as set forth in the complaint or amended complaint." NLRB Rules and Regulations, Sec. 102.35(a). In achieving this basic goal, one of the enumerated powers of an ALJ is to regulate the course of the hearing.

Id. at Sec. 102.35(a)(6). Specifically, the ALJ is empowered to direct the hearing so that it "take[s] place in a dignified atmosphere, free of threats and intimidation," *Altemose Construction Co. v. NLRB*, 514 F.2d 8, 12-13 (3d Cir. 1975), and is "confined to material issues and conducted with all expeditiousness consonant with due process," *Indianapolis Glove Co.*, 88 NLRB 986, 987 (1950). *See also* Fed. R. Evid. 611(a) ("The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to (1) make those procedures effective for determining the truth, (2) avoid wasting time, and (3) protect witnesses from harassment or undue embarrassment). A virtual hearing infringes on Respondent's due process rights in several ways, each of which is described in turn below.

i. The Complexity of this Matter Impedes Respondent's Ability to Properly Defend Itself in a Virtual Platform

The hearing in this matter seeks to resolve allegations relative to six (6) cases. Those six (6) cases involve a time frame of approximately two (2) years. Consequently, there are thousands of pages of documents at issue in this matter. *See* Sec. I.B., *supra* (discussing that the joint exhibits, alone, include nearly 1,000 pages and approximately 115 bookmarks).

The ALJ, on several occasions, has noted the complexity of this matter and has even gone so far as to say the matter would not be an ideal candidate for a virtual hearing. *See, e.g.*, Exhibit X at p. 6:17-23. In fact, the ALJ's explicit reference to the fact that any postponement of the hearing would "disappoint spectators" suggests that the hearing was to be witnessed by other court personnel to see whether such a complex and lengthy hearing was even possible. *See id.* at p. 21:11-16 ("Now, I have to say that we -- there's going to be a lot of disappointed people. We sold a lot of ringside seats to this event and we're going to have to issue a lot of refunds, but -- no, I'm just joking, but that's just the way it is. We are all -- like I said, we are all here in Tara Comeda (phonetic). This is all new to us."). By labeling this hearing as a test case of sorts, this alone

impedes Respondent's ability to properly defend itself. The hearing, if conducted via *Zoom*, would be nothing short of a spectacle to determine whether such a feat is even possible. Requiring Respondent to be the "guinea pig" is an infringement on Respondent's rights to a fair hearing and due process. .

ii. A Virtual Hearing Erodes Respondent's Entitlement to Counsel

Counsel for Respondent submits that pursuant to Rule 1.3 of the Model Rules of Professional Conduct, it was obligated to be physically present with Respondent and Respondent's witnesses during the virtual hearing. *See* R. 1.3, Model Rules of Professional Conduct ("A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."). In doing so, counsel for Respondent encountered many technical difficulties. By way of example, the audio feedback caused by multiple persons being in the same room require that only one microphone be in use. The court reporter repeatedly complained that he could not hear Respondent's counsel because she and co-counsel were required to share a microphone. This of course would be no different when counsel questioned a witness in the same room. The only true remedy would require counsel to not be present in the same room as Respondent. In other words, it is inherent in virtual hearings that counsel *not* be present in-person with their clients. Respondent would be forced to choose between the risk of witness testimony not being heard, which is in direct contravention of the required safeguards of video testimony, or having Respondent sitting alone without representation. Both options, and the requirement to choose, is in contravention of counsel's ethical obligations.

In addition, a virtual hearing deprives Respondent of the ability to be in the room with and confront the charging party and or discriminatee(s) who have lodged the complaint. The ALJ Ruling makes no mention of how such concerns will be alleviated.

iii. A Virtual Hearing Impedes the Fact-Finding Function of the ALJ

Remote examination presents challenges to the evaluation of witness credibility. It is axiomatic that witness credibility determinations lie at the core of any administrative hearing or trial. *See Standard Dry Wall Prods.*, 91 NLRB 544 (1950), *enfd*. 188 F.2d 362 (3d Cir. 1951) (holding that the Board's established policy is ***not*** to overrule an ALJ's credibility resolutions unless the clear preponderance of evidence convinces the Board that the ALJ is incorrect); *see also Wendt Corp.*, 369 NLRB No. 135, n. 2 (2020) (re-iterating that *Standard Dry Wall Prods.* is still the law of the land with respect to the standard which is applied to an ALJ's credibility findings). A virtual hearing through the *Zoom* video platform will significantly diminish (if not remove altogether) the ALJ's ability to engage in credibility determinations.

From a fact-finding perspective, the ability to read expressions, assess body language, make eye contact, and obtain meaning from the timing and tone of witness testimony will all be significantly diminished. Moreover, there is the potential for witnesses to be judged on factors beyond their control: chosen video background, strength of internet connection, his/her surroundings. How an ALJ perceives the witnesses' behavior and credibility plays an important role in the outcome of a hearing, and that perception can be affected due to the lack of direct interaction.[5] With all parties participating remotely, there will be difficulties and delay caused by

[5] Courts have recognized certain disadvantages of video testimony. *See, e.g., United States v. Lawrence*, 248 F.3d 300, 304 (4th Cir. 2001) ("[V]irtual reality is rarely a substitute for actual presence and ... even in an age of advancing technology, watching an event on the screen remains less than the complete equivalent of actually attending it."); *Edwards v. Logan*, 38 F. Supp. 2d 463, 467 (W.D. Va. 1999) ("[Video-conferencing] is not the same as actual presence, and it is to

issues in presenting exhibits, showing them to witnesses, and providing the Respondent with copies of prior written statements of the witnesses who testify. Again, the ALJ Ruling in this matter makes no attempt to address any of these obvious concerns.

The matter of *McDonald's USA, LLC* bears mention. Cases 02-CA-093893, *et al.* In *McDonald's*, with witnesses spread among two geographically different locations (New York and Chicago), the general counsel, the franchisees, and the respondent agreed via stipulation that remote participation in the hearing would not be feasible after several trial runs with government provided video conferencing technology. *See McDonald's USA LLC* Special Appeal From the [ALJ's] July 17, 2018 Order Denying Motions to Approve Settlement, Dated April 13, 2018, at p. 10, which is attached hereto as Exhibit Y (hereinafter "Exhibit Y"). Testimony via video was thus abandoned in favor of preserving due process. *See id.* McDonald's described the technical difficulties with video witness testimony as follows:

> [C]ounsel in a remote location stating, "I cannot see you, Your Honor. I cannot see the witness stand . . . . I cannot see faces . . . . If I were examining a witness, I would not be in a position to do so effectively because I can't read their body language. I can't see their. . . I can't see their facial expressions."); id. at 12-13 (citing Tr. 616:4- 12) (counsel in remote location noting that he could not see counsel in Region 2 because they appeared as "Lilliputians . . . little ants on the screen"); id. at 13 (citing Tr. 825:19-25) (Counsel for the General Counsel noting that the "small desktop monitors that we have in the courtroom here are blinking . . . [due to] a hardware failure . . . ."); id. at 14 (citing Tr. 638:23-639:1) (counsel in remote location stating that the sound feed was "cutting in and out"); id. at 5 (citing Tr. 543:8-14) (counsel in Region 2 unable to connect to General Counsel provided internet to exchange exhibits); id. at 6 (citing Tr. 575:1-5) (counsel in remote Regions unable to connect to General Counsel-provided internet to exchange exhibits).[6]

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be expected that the ability to observe demeanor, central to the fact-finding process, may be lessened in a particular case by video[-]conferencing.").

[6] *See, e.g., McDonald's USA, LLC*'s Motion to Sever Due to Technological Difficulties (Feb. 25, 2016) at 12 (citing Tr. 612:1-613:1).

Id. at fn. 12. As evidenced in the *McDonald's* case - involving only two remote locations (Region 2 and Region 13) - it was near impossible to preserve the integrity of the hearing utilizing remote participation.

In the instant matter, the ALJ, court reporter, party representations, counsel, and witnesses are all joining the hearing from several separate locations – all of which heightens the due process issues associated with a virtual hearing. The potential for off-camera coaching, undue influence, or other factors is high. *See, e.g., Westside Paintings, Inc.*, 328 NLRB 796 (1999) ("In addition, the use of telephone testimony may impair a party's right of cross-examination and raise fundamental questions about the fairness of the hearing. For example, a witness testifying by telephone may be reading from a prepared statement or may have other documents before him of which an opposing party is entirely unaware. Indeed, there could even be another individual standing by the side of the "telephone witness" influencing his testimony. While there is no suggestion of any such conduct here, nonetheless because the "telephone witness" is not physically present in the hearing room, it is simply not practicable for the judge to guard against such potential misconduct and ensure the integrity of the hearing."). While *Westside Paintings, Inc*. involves testimony by telephone – the similarities are obvious: witnesses could still have documents or a teleprompter in front of them and/or be coached off camera. In other words, the same due process concerns reign true for hearings by videoconference.

There can be no doubt that a five (5) day hearing (at minimum), held via videoconference, runs afoul of Respondent's basic due process entitlements.

B. <u>There is No Good Cause Showing for a Virtual Hearing</u>

Section 102.35(c) of the Board's Rules and Regulations requires a party to show good cause before a videoconference hearing may be ordered:

> (c) Upon a showing of good cause based on compelling circumstances, and under appropriate safeguards, the taking of video testimony by contemporaneous transmission from a different location may be permitted.
>
> 1) Applications to obtain testimony by videoconference **must be presented to the Administrative Law Judge in writing**, and the requesting party must simultaneously serve notice of the application upon all parties to the hearing . . .

29 C.F.R. § 102.35(c)(1) (emphasis added). The regulatory language thus requires a party to request a videoconference hearing before the ALJ can determine whether to permit it. *See Tesla, Inc.*, 32–CA–197020, unpub. Board order issued July 16, 2018 (2018 WL 3436889) (ALJ denied General Counsel's request for motion by videoconference).

In *Tesla*, the Board's rationale for restricting video testimony is based on Federal Rule of Civil Procedure 43 and "indicates a strong preference for in-person testimony." *Id.* Indeed, the 1996 Advisory Committee Notes to Rule 43(a) stress that "[t]he very ceremony of trial and the presence of the factfinder may exert a powerful force for truthtelling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition." *Id.*

Likewise, in *Oncor Electric Delivery Co.*, the Board upheld an ALJ's decision to permit remote video testimony of a single witness at an unfair labor practice hearing because proper safeguards were put in place. 364 NLRB No. 58 (July 29, 2016), vacated on other grounds by *Oncor Elec. Delivery Co. LLC v. NLRB*, 887 F.3d 488 (DC Cir. 2018). Specifically, the testifying witness was not an alleged discriminatee or a direct witness to the events at issue in the complaint. *See id.* The witness testified in the presence of an NLRB Board agent at an NLRB regional office and the testimony provided was merely circumstantial background evidence needed to understand the broader workplace environment. *See id.*

Here, while the parties did initially agree, neither party has requested a hearing by videoconference and no good cause showing has been made—or even requested. Moreover, in stark contrast to *Oncor*, the ALJ has not put the proper safeguards in place and the testimony involved involves not only alleged discriminatee(s) but witness testimony speaking to more than just "circumstantial background evidence." As such, a videoconference hearing is ill-suited for a matter as complex as the one currently before the ALJ. In such circumstances, the videoconference format should not be permitted.

C. <u>The ALJ Has Not Protected the Integrity of the Hearing</u>

Consistent with the Board's interest in protecting the integrity of the hearing, Section 102.35(c) of the Board's Rules and Regulations only permits limited video testimony where "appropriate safeguards are in place." These safeguards are a large step in ensuring due process.

Section 102.35(c)(2) states that appropriate safeguards "must ensure that the [ALJ] has the ability to assess the witness's credibility and the parties have a meaningful opportunity to examine and cross-examine the witness." The safeguards must also include "at a minimum" measures ensuring that:

> 1) exhibits are exchanged in advance; (2) both the reporter, judge and the participants can hear the testimony; (3) Party representatives have an opportunity to be present at the remote location where the ALJ/reporter are; 4) the camera view of the feed is adjustable; and 4) video technology assistance is available to assist with additional safeguards or issues.

Board's Rules and Regulations, Sec. 102.35(c)(2).

Only two of the foregoing ***minimum*** safeguards were implemented in the present case – i.e. exhibits exchanged in advance[7] and technology assistance by virtue of the Courtroom Deputy.

[7] Please see Section IV.D., *infra*.

The ALJ's indeterminate reference to a preliminary conference call with the parties to discuss accessing the *Zoom* hearing, preparing for witnesses to testify via *Zoom*, number and offering documents/exhibits through *Zoom*, public access to the *Zoom* hearing, etc., offers no indication of what safeguards would be put in place to protect the integrity of the hearing in this matter. Most importantly, neither the General Counsel, Respondent, nor witnesses to this matter have received any significant training or information regarding the *Zoom* technology which the ALJ plans to engage for the hearing.

Further, in just the short time this hearing was on the record, it was clear the other safeguards were not in place. For example, the court reporter complained that he could not hear co-counsel sitting next to each other. As pointed out on the record, counsel for Respondent were sitting right next to each other (far closer than social distancing requires and would likely have had to wear a mask during pendency of the hearing). If the court reporter could not hear counsel sitting immediately beside each other, he surely would not be able to hear a witness sitting across from counsel as would generally occur. No one, not even the Courtroom Deputy, had a solution to this problem.

Moreover, the Courtroom Deputy had the ability to mute microphones and handle other mechanics that could ultimately lead to missed objections or even missed testimony. All of this flies in the face of the safeguards required.

D. Virtual Hearings Require Procedural Mandates That Go Beyond What is Required by the Rules

As Counsel for the General Counsel has noted time and time again, the Board does not permit pre-trial discovery. *See, e.g.*, Exhibit M at p. 7 (citing cases). Assuming, for the moment, the accuracy of this averment, a virtual hearing runs afoul of that premise. While Respondent acknowledges that the minimum safeguards discussed above include this requirement, this only

highlights the safeguards for perhaps one video witness and cannot be reasonably applied to an entire five-day hearing.

First, the ALJ's Pre-Hearing Order requests that all exhibits be shared via email or the SharePoint platform in advance of the hearing ***with all parties of record***. *See* Exhibit K. If the parties were to hold this hearing in-person, there would be no entitlement by the other parties to Respondent's proposed exhibits. The foregoing directly conflicts with Board precedent regarding pre-trial discovery. *See, e.g.*, *Offshore Mariners United*, 338 NLRB 745, 746 (2002) (it is well established that the Board, with court approval, does not allow for pretrial discovery); *David R. Webb Co.*, 311 NLRB 1135 (1993) (due to the unique nature of its jurisdiction, the Board does not permit pretrial discovery because of the very possibility of retaliation and further discrimination by a responded accused of violating employees' § 7 rights); *Mid-Atlantic Rest. Grp. LLC v. NLRB*, 722 F. App'x 284, 287, n. 2 (3d Cir. 2018).

Second, the very nature of a virtual hearing requires the parties to agree-on as many joint exhibits as possible. While Respondent does not maintain such was deliberately done in the present matter, it bears mention that the joint exhibits were not finalized until August 1, 2020 – two days before the hearing date. While Counsel for the General Counsel graciously took the lead on compiling the joint exhibits, Respondent was, essentially, at their mercy. Their delay caused delay for the entire case and, ultimately, made it impossible to finalize so many joint exhibits in advance.

E. The ALJ's Ruling and Attempt to Allow "Visitors" Undermines the Requirement that Hearings be Public and/or available to the Public

Section 101.10 of the Board's Rules states that "[e]xcept in extraordinary situations the hearing is open to the public and usually conducted in the region where the charge originated."

Additionally, Section 102.34 of the Board's Rules states that "hearings will be public unless otherwise ordered by the Board or the Administrative Law Judge."

The ALJ and the General Counsel certainly attempted to make this hearing "public." In the short timeframe during which the parties argued Respondent's Motion, there were several unidentified guests with nothing more than a phone number appearing on the screen or in some instances a Judge's last name or simply a name and picture of some unknown individual. These "attendees" went unannounced by the ALJ, the Courtroom Deputy or the Court Reporter and would "pop" onto the screen without mention. This included still photographs of the judge or moving ellipses under a phone number.

While the Courtroom Deputy tried to analogize this to someone knocking on the hearing door and walking in, the two are not comparable. In a hearing room, everyone sees a person enter and can quickly ask who it is. Upon identification, they go to sit *behind* counsel. This takes no more than a few seconds.

However, in a virtual hearing, and even in the short preliminary discussion during this case, many multiple "visitors" popped on and off the screen without any mention. If seen while questioning or listening to a witness, this would be highly distracting. This is akin to being right in front of counsel, not seated in the gallery. Conversely, if looking at documents on the screen as a virtual platform requires, these "visitors" may go unnoticed. This is not fair to the parties as they are entitled to know who is in attendance. The general lack of transparency in video conferencing platforms may erode public trust and create worse outcomes for respondent/employers.

F. <u>The General Counsel and the Charging Party are not Prejudiced by a Delay</u>

Perhaps most critically, none of the other parties are prejudiced by a continuance of the hearing until such time as the hearing can be held in person. In *U.S. v. Burton*, 584 F.2d 485 (D.C.

Cir. 1978), the federal appellate court identified factors the trial court should consider when deciding a request for a continuance:

> What is a reasonable delay necessarily depends on all the surrounding facts and circumstances. Some of the factors to be considered in the balance include: the length of the requested delay; whether other continuances have been requested and granted; the balanced convenience or inconvenience to the litigants, witnesses, counsel, and the court; whether the requested delay is for legitimate reasons, or whether it is dilatory, purposeful, or contrived; whether the defendant contributed to the circumstance which gives rise to the request for a continuance; whether the defendant has other competent counsel prepared to try the case, including the consideration of whether the other counsel was retained as lead or associate counsel; whether denying the continuance will result in identifiable prejudice to defendant's case, and if so, whether this prejudice is of a material or substantial nature; the complexity of the case; and other relevant factors which may appear in the context of any particular case. (Footnotes to citations omitted).

Burton, 584 F.2d at 491. Under these factors a continuance is appropriate.

To begin, the Charging Party has not objected to Respondent's Motion to Postpone and is not opposing Respondent's Appeal. *See* Exhibit X at p. 10:11-22. As the aggrieved party in this matter, this alone is compelling.

While Counsel for the General Counsel objected to Respondent's Motion to Postpone and likely will oppose Respondent's Appeal, Counsel for the General Counsel's arguments are unavailing. First, the hearing has been continued four (4) times as a result of the General Counsel continuing to add allegations to each complaint. *See, e.g.*, Exhibits A-E. Had time been so sensitive, the General Counsel could have held a hearing on some of these allegations likely a year ago.

Second, the General Counsel ran the risk of further delaying the hearing scheduled for August 3, 2020 when, the night before, it attempted to add allegations to the Complaint without first allowing a complaint to be issued and without first allowing Respondent to formally respond

– both are required by Sections 102.15 and 102.20 of the Board's Rules and Regulations. *See* Exhibits S and T. Third, and relatedly, had the ALJ considered and granted Counsel for the General Counsel's Motion to Amend on August 3, 2020, a continuance of the hearing would have likely occurred any way.

Moreover, the request for the "delay" is not due to any one party or their attorney, but to factors not of their making nor within their control. The request is a legitimate request given the complexity and issues of veracity and credibility to decide material facts in dispute at trial. *See, e.g.*, *Smith-Weik Machinery Corp. v. Murdock Machine & Engineering Co.*, 423 F.2d 842, 844-45 (5th Cir. 1970) (taking into consideration in part the complicated nature of the case to hold the denial of a continuance was in error); *Quinn v. City of Tuskegee*, No. 3:14-cv-1033-ALB, 2020 WL 2846662, at *1-2 (M.D. Ala. June 1, 2020) (ordering a continuance of the trial and discussing the timing of the trial related to the novel coronavirus effect on persons' ability to move and gather and state regulating of the virus).

For these reasons, the parties will not be prejudiced by continuing the hearing until it can be conducted in person.

V. CONCLUSION

For the aforementioned reasons, a videoconference hearing falls far short of minimal standards for a full and fair hearing. The current COVID-19 pandemic does not justify setting aside basic procedural due process and other rights in the name of convenience or expediency. As

such, the ALJ's August 3, 2020 Ruling was in error and the ALJ should be required to rescind his August 3, 2020 Ruling and postpone the hearing to a date when it can safely be held in person.

Respectfully submitted this 7th day of August, 2020.

Respectfully submitted,

s/ Rick Grimaldi

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Addendum

RELEVANT ADMINISTRATIVE RULES AND COMMENTARY

The NLRB Rules, adopted effective September 29, 2017 (82 FR 43695), state in relevant part as follows:

> **Section 102.26 Motions; rulings and orders part of the record; rulings not to be appealed directly to the Board without special permission; requests for special permission to appeal.**
>
> All motions, rulings, and orders will become a part of the record, except that rulings on motions to revoke subpoenas will become a part of the record only upon the request of the party aggrieved thereby as provided in § 102.31. Unless expressly authorized by the Rules and Regulations, rulings by the Regional Director or by the Administrative Law Judge on motions and/or by the Administrative Law Judge on objections, and related orders, may not be appealed directly to the Board except by special permission of the Board, but will be considered by the Board in reviewing the record if exception to the ruling or order is included in the statement of exceptions filed with the Board pursuant to § 102.46. Requests to the Board for special permission to appeal from a ruling of the Regional Director or of the Administrative Law Judge, together with the appeal from such ruling, must be filed in writing promptly and within such time as not to delay the proceeding, and must briefly state the reasons special permission may be granted and the grounds relied on for the appeal. The moving party must simultaneously serve a copy of the request for special permission and of the appeal on the other parties and, if the request involves a ruling by an Administrative Law Judge, on the Administrative Law Judge. Any statement in opposition or other response to the request and/or to the appeal must be filed within 7 days of receipt of the appeal, in writing, and must be served simultaneously on the other parties and on the Administrative Law Judge, if any. If the Board grants the request for special permission to appeal, it may proceed immediately to rule on the appeal. (emphasis added)
>
> * * *
>
> **Section 102.35 Duties and powers of Administrative Law Judges; stipulations of cases to Administrative Law Judges or to the Board; assignment and powers of settlement judges**
>
> . . .
>
> (c) Upon a showing of good cause based on compelling circumstances, and under appropriate safeguards, the taking of video testimony by contemporaneous transmission from a different location may be permitted.

Section 102.38. Rights of Parties

Any party has the right to appear at the hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record documentary or other evidence, except that the Administrative Law Judge may limit the participation of any party as appropriate. Documentary evidence must be submitted in duplicate for the record with a copy to each party.

The Federal Rules of Civil Procedure state in relevant part as follows:

Rule 43. Taking Testimony

(a) In Open Court. At trial, the witnesses' testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.

* * *

Rule 77 Conducting Business; Clerk's Authority; Notice of an Order or Judgment

. . .

(b) Place for Trial and Other Proceedings. Every trial on the merits must be conducted in open court and, so far as convenient, in a regular courtroom. Any other act or proceeding may be done or conducted by a judge in chambers, without the attendance of the clerk or other court official, and anywhere inside or outside the district. But no hearing—other than one ex parte—may be conducted outside the district unless all the affected parties consent.

The Notes of Advisory Committee on 1996 amendments to the Federal Rules of Civil Procedure state in relevant part as follows:

Contemporaneous transmission of testimony from a different location is permitted only on showing good cause in compelling circumstances. The <u>importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truthtelling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition. Transmission cannot be</u>

justified merely by showing that it is inconvenient for the witness to attend the trial.

The most persuasive showings of good cause and compelling circumstances are likely to arise when a witness is unable to attend trial for unexpected reasons, such as accident or illness, but remains able to testify from a different place. Contemporaneous transmission may be better than an attempt to reschedule the trial, particularly if there is a risk that other—and perhaps more important—witnesses might not be available at a later time.

Other possible justifications for remote transmission must be approached cautiously. Ordinarily depositions, including video depositions, provide a superior means of securing the testimony of a witness who is beyond the reach of a trial subpoena, or of resolving difficulties in scheduling a trial that can be attended by all witnesses. Deposition procedures ensure the opportunity of all parties to be represented while the witness is testifying. An unforeseen need for the testimony of a remote witness that arises during trial, however, may establish good cause and compelling circumstances. Justification is particularly likely if the need arises from the interjection of new issues during trial or from the unexpected inability to present testimony as planned from a different witness.

Good cause and compelling circumstances may be established with relative ease if all parties agree that testimony should be presented by transmission. The court is not bound by a stipulation, however, and can insist on live testimony. Rejection of the parties' agreement will be influenced, among other factors, by the apparent importance of the testimony in the full context of the trial.

A party who could reasonably foresee the circumstances offered to justify transmission of testimony will have special difficulty in showing good cause and the compelling nature of the circumstances. Notice of a desire to transmit testimony from a different location should be given as soon as the reasons are known, to enable other parties to arrange a deposition, or to secure an advance ruling on transmission so as to know whether to prepare to be present with the witness while testifying.

No attempt is made to specify the means of transmission that maybe used. Audio transmission without video images may be sufficient in some circumstances, particularly as to less important testimony. Video transmission ordinarily should be preferred when the cost is reasonable in relation to the matters in dispute, the means of the parties, and the circumstances that justify transmission.

Transmission that merely produces the equivalent of a written statement ordinarily should not be used.

Safeguards must be adopted that ensure accurate identification of the witness and that protect against influence by persons present with the witness. Accurate transmission likewise must be assured.

Other safeguards should be employed to ensure that advance notice is given to all parties of foreseeable circumstances that may lead the proponent to offer testimony by transmission. Advance notice is important to protect the opportunity to argue for attendance of the witness at trial. Advance notice also ensures an opportunity to depose the witness, perhaps by video record, as a means of supplementing transmitted testimony. (emphasis added)

Exhibit A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

OXARC, INC.

and Case 19-CA-230472

TEAMSTERS LOCAL 839

and Case 19-CA-232728

JARED FOSTER, an Individual

ORDER CONSOLIDATING CASES, CONSOLIDATED COMPLAINT, AND NOTICE OF HEARING

Pursuant to § 102.33 of the Rules and Regulations of the National Labor Relations Board (the "Board") and to avoid unnecessary costs or delay, IT IS ORDERED THAT Cases 19-CA-230472 and 19-CA-23278, which are based on charges filed respectively by Teamsters Local 839 (the "Union") and Jared Foster ("Foster"), an Individual, against Oxarc, Inc. ("Respondent"), are consolidated.

This Order Consolidating Cases, Consolidated Complaint, and Notice of Hearing, which is based on these charges, is issued pursuant to § 10(b) of the National Labor Relations Act (the "Act"), 29 U.S.C. § 151 *et seq.*, and § 102.15 of the Board's Rules and Regulations, and alleges Respondent has violated the Act as described below.

1.

(a) The charge in Case 19-CA-230472 was filed by the Union on November 5, 2018, and a copy was served on Respondent by regular mail on that day.

(b) The charge in Case 19-CA-232728 was filed by Foster on December 11, 2018, and a copy was served on Respondent by regular mail on December 13, 2018.

2.

(a) At all material times, Respondent has been a State of Washington corporation with an office and place of business in Pasco, Washington (the "Facility"), engaged in the business of providing welding and industrial supplies, safety products and training, as well as industrial, medical, and specialty gasses.

(b) In conducting its operations described above in paragraph 2(a) during the past 12 months, a representative period, Respondent had gross revenues in excess of $500,000.

(c) In conducting its operations described above in paragraph 2(a) during the past 12 months, a representative period, Respondent purchased and received at the Facility goods valued in excess of $50,000 directly from points located outside the State of Washington.

(d) At all material times, Respondent has been an employer engaged in commerce within the meaning of §§ 2(2), (6), and (7) of the Act.

3.

At all material times, the Union has been a labor organization within the meaning of § 2(5) of the Act.

4.

At all material times, the following individuals held the positions set forth opposite their names and have been supervisors of Respondent within the meaning of § 2(11) of the Act and/or agents of Respondent within the meaning of § 2(13) of the Act:

Kelly Bladow	--	Regional Manager
Jenna Fitzgerald	--	Owner
Jason Kirby	--	District Manager

5.

On about June 4, 2018, Respondent, by Fitzgerald and/or Kirby at the Facility, interrogated its employees about their feelings concerning Respondent's collective bargaining proposals.

6.

(a) On June 14, 2018, Respondent discharged its employee Foster.

(b) Respondent engaged in the conduct described above in paragraph 6(a) because Foster engaged in Union and/or protected concerted activities, and to discourage employees from engaging in these or other Union or protected, concerted activities.

7

By the conduct described above in paragraphs 5 and 6, Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in § 7 of the Act in violation of § 8(a)(1) of the Act.

8.

By the conduct described above in paragraph 6, Respondent has been discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of §§ 8(a)(1) and (3) of the Act.

9.

The unfair labor practices of Respondent described above affect commerce within the meaning of §§ 2(6) and (7) of the Act.

WHEREFORE, as part of the remedy for Respondent's unfair labor practices alleged above in paragraph 6, the General Counsel seeks an order making the Charging Party whole for any loss of earnings and other benefits suffered as a result of Respondent's discrimination, including all search-for-work and work-related expenses as well as reasonable consequential damages incurred by him as a result of the Respondent's unlawful conduct. The General Counsel further seeks an order requiring reimbursement of amounts equal to the difference in taxes owed upon receipt of a lump-sum payment and taxes that would have been owed had there been no discrimination, as well as all other relief as may be just and proper to remedy the unfair labor practices alleged.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to §§ 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the consolidated complaint. The answer must be received by this office on or before **March 14, 2019**, or postmarked on or before **March 13, 2019**. Unless filed electronically in a pdf format, Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically by using the E-Filing system on the Agency's website. In order to file an answer electronically, access the Agency's website at http://www.nlrb.gov, click on E-Gov, then click on the E-Filing link on the pull-down menu. Click on the "File Documents" button under "Regional, Subregional and Resident Offices" and then follow the directions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website

informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. *See* § 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the document need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf document containing the required signature, then the E-filing rules require that such answer containing the required signature be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must be accomplished in conformance with the requirements of § 102.114 of the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed or if an answer is filed untimely, the Board may find, pursuant to Motion for Default Judgment, that the allegations in the consolidated complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE that, beginning on the **9th day of July, 2019,** at **9:00 a.m.,** and on consecutive days thereafter until concluded, at a location to be determined in **Pasco, Washington,** a hearing will be conducted before an Administrative Law Judge of the National Labor Relations Board. At the hearing Respondent and any other party

to this proceeding have the right to appear and present testimony regarding the allegations in this consolidated complaint. The procedures to be followed at the hearing are described in the attached form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

DATED at Seattle, Washington, this 28th day of February, 2019.

R K Hooks

Ronald K. Hooks, Regional Director
National Labor Relations Board, Region 19
2948 Jackson Federal Building
915 Second Avenue
Seattle, Washington 98174

Attachments

Form NLRB-4668
(6-2014)

Procedures in NLRB Unfair Labor Practice Hearings

The attached complaint has scheduled a hearing that will be conducted by an administrative law judge (ALJ) of the National Labor Relations Board who will be an independent, impartial finder of facts and applicable law. **You may be represented at this hearing by an attorney or other representative.** If you are not currently represented by an attorney, and wish to have one represent you at the hearing, you should make such arrangements as soon as possible. A more complete description of the hearing process and the ALJ's role may be found at Sections 102.34, 102.35, and 102.45 of the Board's Rules and Regulations. The Board's Rules and regulations are available at the following link: www.nlrb.gov/sites/default/files/attachments/basic-page/node-1717/rules_and_regs_part_102.pdf.

The NLRB allows you to file certain documents electronically and you are encouraged to do so because it ensures that your government resources are used efficiently. To e-file go to the NLRB's website at www.nlrb.gov, click on "e-file documents," enter the 10-digit case number on the complaint (the first number if there is more than one), and follow the prompts. You will receive a confirmation number and an e-mail notification that the documents were successfully filed.

Although this matter is set for trial, this does not mean that this matter cannot be resolved through a settlement agreement. The NLRB recognizes that adjustments or settlements consistent with the policies of the National Labor Relations Act reduce government expenditures and promote amity in labor relations and encourages the parties to engage in settlement efforts.

I. BEFORE THE HEARING

The rules pertaining to the Board's pre-hearing procedures, including rules concerning filing an answer, requesting a postponement, filing other motions, and obtaining subpoenas to compel the attendance of witnesses and production of documents from other parties, may be found at Sections 102.20 through 102.32 of the Board's Rules and Regulations. In addition, you should be aware of the following:

- **Special Needs:** If you or any of the witnesses you wish to have testify at the hearing have special needs and require auxiliary aids to participate in the hearing, you should notify the Regional Director as soon as possible and request the necessary assistance. Assistance will be provided to persons who have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.603.

- **Pre-hearing Conference:** One or more weeks before the hearing, the ALJ may conduct a telephonic prehearing conference with the parties. During the conference, the ALJ will explore whether the case may be settled, discuss the issues to be litigated and any logistical issues related to the hearing, and attempt to resolve or narrow outstanding issues, such as disputes relating to subpoenaed witnesses and documents. This conference is usually not recorded, but during the hearing the ALJ or the parties sometimes refer to discussions at the pre-hearing conference. You do not have to wait until the prehearing conference to meet with the other parties to discuss settling this case or any other issues.

II. DURING THE HEARING

The rules pertaining to the Board's hearing procedures are found at Sections 102.34 through 102.43 of the Board's Rules and Regulations. Please note in particular the following:

- **Witnesses and Evidence**: At the hearing, you will have the right to call, examine, and cross-examine witnesses and to introduce into the record documents and other evidence.

- **Exhibits: Each exhibit offered in evidence must be provided in duplicate to the court reporter and a copy of each of each exhibit should be supplied to the ALJ and each party when the exhibit is offered in evidence.** If a copy of any exhibit is not available when the original is received, it will be the responsibility of the party offering such exhibit to submit the copy to the ALJ before the close of hearing.

(OVER)

If a copy is not submitted, and the filing has not been waived by the ALJ, any ruling receiving the exhibit may be rescinded and the exhibit rejected.

- **Transcripts**: An official court reporter will make the only official transcript of the proceedings, and all citations in briefs and arguments must refer to the official record. The Board will not certify any transcript other than the official transcript for use in any court litigation. Proposed corrections of the transcript should be submitted, either by way of stipulation or motion, to the ALJ for approval. Everything said at the hearing while the hearing is in session will be recorded by the official reporter unless the ALJ specifically directs off-the-record discussion. If any party wishes to make off-the-record statements, a request to go off the record should be directed to the ALJ.

- **Oral Argument:** You are entitled, on request, to a reasonable period of time at the close of the hearing for oral argument, which shall be included in the transcript of the hearing. Alternatively, the ALJ may ask for oral argument if, at the close of the hearing, if it is believed that such argument would be beneficial to the understanding of the contentions of the parties and the factual issues involved.

- **Date for Filing Post-Hearing Brief**: Before the hearing closes, you may request to file a written brief or proposed findings and conclusions, or both, with the ALJ. The ALJ has the discretion to grant this request and to will set a deadline for filing, up to 35 days.

III. AFTER THE HEARING

The Rules pertaining to filing post-hearing briefs and the procedures after the ALJ issues a decision are found at Sections 102.42 through 102.48 of the Board's Rules and Regulations. Please note in particular the following:

- **Extension of Time for Filing Brief with the ALJ:** If you need an extension of time to file a post-hearing brief, you must follow Section 102.42 of the Board's Rules and Regulations, which requires you to file a request with the appropriate chief or associate chief administrative law judge, depending on where the trial occurred. You must immediately serve a copy of any request for an extension of time on all other parties and furnish proof of that service with your request. You are encouraged to seek the agreement of the other parties and state their positions in your request.

- **ALJ's Decision:** In due course, the ALJ will prepare and file with the Board a decision in this matter. Upon receipt of this decision, the Board will enter an order transferring the case to the Board and specifying when exceptions are due to the ALJ's decision. The Board will serve copies of that order and the ALJ's decision on all parties.

- **Exceptions to the ALJ's Decision**: The procedure to be followed with respect to appealing all or any part of the ALJ's decision (by filing exceptions with the Board), submitting briefs, requests for oral argument before the Board, and related matters is set forth in the Board's Rules and Regulations, particularly in Section 102.46 and following sections. A summary of the more pertinent of these provisions will be provided to the parties with the order transferring the matter to the Board.

FORM NLRB 4338
(6-90)

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
NOTICE

Cases 19-CA-230472 and 19-CA-232728

The issuance of the notice of formal hearing in this case does not mean that the matter cannot be disposed of by agreement of the parties. On the contrary, it is the policy of this office to encourage voluntary adjustments. The examiner or attorney assigned to the case will be pleased to receive and to act promptly upon your suggestions or comments to this end.

An agreement between the parties, approved by the Regional Director, would serve to cancel the hearing. However, unless otherwise specifically ordered, the hearing will be held at the date, hour, and place indicated. Postponements ***will not be granted*** unless good and sufficient grounds are shown ***and*** the following requirements are met:

(1) The request must be in writing. An original and two copies must be filed with the Regional Director when appropriate under 29 CFR 102.16(a) or with the Division of Judges when appropriate under 29 CFR 102.16(b).

(2) Grounds must be set forth in ***detail***;

(3) Alternative dates for any rescheduled hearing must be given;

(4) The positions of all other parties must be ascertained in advance by the requesting party and set forth in the request; and

(5) Copies must be simultaneously served on all other parties (listed below), and that fact must be noted on the request.

Except under the most extreme conditions, no request for postponement will be granted during the three days immediately preceding the date of hearing.

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Jared Foster
6219 Wrigley Dr.
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Exhibit B

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

OXARC, INC.	
and	Cases 19-CA-230472
TEAMSTERS LOCAL 839	
and	19-CA-237336 19-CA-237499 19-CA-238503
TEAMSTERS LOCAL 690	
and	19-CA-232728
JARED FOSTER, an Individual	

ORDER FURTHER CONSOLIDATING CASES, SECOND CONSOLIDATED COMPLAINT, AND NOTICE OF RESCHEDULED HEARING

On February 28, 2019, a Consolidated Complaint and Notice of Hearing issued in Cases 19-CA-230472 and 19-CA-232728, based on charges filed respectively by Teamsters Local 839 and Jared Foster ("Foster"), an Individual, against Oxarc, Inc. ("Respondent"), alleging that Respondent engaged in unfair labor practices that violate the National Labor Relations Act (the "Act"), 29 U.S.C. § 151 *et seq.* Pursuant to § 102.33 of the Rules and Regulations of the National Labor Relations Board (the "Board") and to avoid unnecessary costs or delay, IT IS ORDERED THAT those cases are further consolidated with Cases 19-CA-237336, 19-CA-237499, and 19-CA-238503, filed by Teamsters Local 690, which allege that Respondent has engaged in further unfair labor practices within the meaning of the Act.

This Second Consolidated Complaint and Notice of Rescheduled Hearing, issued pursuant to § 10(b) of the Act and § 102.15 of the Board's Rules and Regulations, is based on these further consolidated cases and alleges that Respondent has violated the Act as described below.

1.

(a) The charge in Case 19-CA-230472 was filed by Teamsters Local 839 on November 5, 2018, and a copy was served on Respondent by regular mail on that day.

(b) The charge in Case 19-CA-232728 was filed by Foster on December 11, 2018, and a copy was served on Respondent by regular mail on December 13, 2018.

(c) The charge in Case 19-CA-237336 was filed by the Teamsters Local 690 on March 6, 2019, and a copy was served on Respondent by regular mail on that day.

(d) The charge in Case 19-CA-237449 was filed by Teamsters Local 690 on March 8, 2019, and a copy was served on Respondent by regular mail on March 12, 2019.

(e) The charge in Case 19-CA-238503 was filed by Teamsters Local 690 on March 26, 2019, and a copy was served on Respondent by regular mail on March 27, 2019.

2.

(a) At all material times, Respondent has been a State of Washington corporation with an office and place of business in Pasco, Washington (the "Facility"), engaged in the business of providing welding and industrial supplies, safety products and training, as well as industrial, medical, and specialty gasses.

(b) In conducting its operations described above in paragraph 2(a) during the past 12 months, a representative period, Respondent had gross revenues in excess of $500,000.

(c) In conducting its operations described above in paragraph 2(a) during the past 12 months, a representative period, Respondent purchased and received at the Facility goods valued in excess of $50,000 directly from points located outside the State of Washington.

(d) At all material times, Respondent has been an employer engaged in commerce within the meaning of §§ 2(2), (6), and (7) of the Act.

3.

(a) At all material times, Teamsters Local 839 has been a labor organization within the meaning of § 2(5) of the Act.

(b) At all material times, Teamsters Local 690 has been a labor organization within the meaning of § 2(5) of the Act.

(c) At all material times, Teamsters Local 760 has been a labor organization within the meaning of § 2(5) of the Act.

4.

At all material times, the following individuals held the positions set forth opposite their names and have been supervisors of Respondent within the meaning of § 2(11) of the Act and/or agents of Respondent within the meaning of § 2(13) of the Act:

Kelly Bladow	--	Regional Operations Manager
Jenna Fitzgerald	--	Fleet Director, Insurance and Payroll
Jud Grubbs	--	Labor Consultant/Bargaining Spokesperson
Jason Kirby	--	Vice President and General Manager

James Paradis -- Manager

5.

(a) The following employees of Respondent (the "Unit") constitute a unit appropriate for the purposes of collective bargaining within the meaning of § 9(b) of the Act:

> All drivers employed by Respondent at its various facilities throughout Washington, Idaho, and Oregon within the jurisdictions of Teamsters Locals 690, 760, and 839 (the "Unions"); but excluding all other employees, and guards and supervisors as defined by the Act.

(b) At all material times since at least 1990, Respondent has recognized the Unions as the exclusive collective-bargaining representative of the Unit. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective from June 1, 2012, to May 31, 2017.

(c) At all material times, based on § 9(a) of the Act, the Unions have been the exclusive collective-bargaining representative of the Unit.

6.

On about June 4, 2018, Respondent, by Fitzgerald and/or Kirby at the Facility, interrogated its employees about their feelings concerning Respondent's collective bargaining proposals.

7.

(a) On June 14, 2018, Respondent discharged its employee Foster.

(b) Respondent engaged in the conduct described above in paragraph 7(a) because Foster engaged in Union and/or protected concerted activities, and to

discourage employees from engaging in these or other Union or protected, concerted activities.

8.

(a) At various times from about April 2017 through February 28, 2019, Respondent and the Unions met for the purposes of negotiating a successor collective-bargaining agreement to the agreement described above in paragraph 5(b).

(b) On February 28, 2019, Respondent provided the Unions with its last, best, and final offer ("LBFO").

(c) On February 28, 2019, while bargaining between Respondent and the Unions for a successor contract as described above in paragraph 8(a) was ongoing, Respondent declared impasse.

(d) On March 11, 2019, Respondent implemented portions of its LBFO as well as terms and conditions of employment not contained in its LBFO.

(e) The subjects set forth above in paragraph 8(d) relates to the wages, hours, and other terms and conditions of employment of the Unit and are mandatory subjects for the purposes of collective bargaining.

(f) Respondent engaged in the conduct described above in paragraph 8(d) without first bargaining with the Unions to a good faith impasse, and at a time when no overall impasse had been reached on bargaining for a successor agreement as a whole.

(g) Additionally, and regardless of whether the parties reached an overall impasse in bargaining, Respondent unlawfully and unilaterally implemented the following terms and conditions of employment for the Unit on March 11, 2019: a no-strike clause, a fixed term of the agreement, a grievance and arbitration provision, a provision barring

requests for increases in health benefits, a merit wage system, as well as the versions of the 401(k) and health plans that differed from the LBFO.

9.

(a) In about late-December 2018, a date unknown to the General Counsel but within the knowledge of Respondent, Respondent began making employees pay for required Company-issued work boots in excess of $135.

(b) On March 6, 2018, Respondent began prohibiting employees from wearing non-Respondent logo hats and hear wear, including employees wearing Union-logo hats.

(c) Respondent engaged in the conduct described above in paragraph 9(a) and 9(b) without prior notice to the Unions and without affording the Unions an opportunity to bargain with Respondent with respect to the above conduct and/or the effects of this conduct.

(d) Respondent engaged in the conduct described above in paragraph 9(b) because employees of the Unit engaged in Union and/or protected concerted activities, including wearing Union-log hats at work.

10.

By the conduct described above in paragraphs 6, 7, and 9(b), Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in § 7 of the Act in violation of § 8(a)(1) of the Act.

11.

By the conduct described above in paragraph 7, Respondent has been discriminating in regard to the hire or tenure or terms or conditions of employment of its

employees, thereby discouraging membership in a labor organization in violation of §§ 8(a)(1) and (3) of the Act.

12.

By the conduct described above in paragraphs 8 and 9, Respondent has been failing and refusing to bargain collectively with the Union as the exclusive collective-bargaining representative of its Unit employees in violation of §§ 8(a)(1) and (5) of the Act.

13.

The unfair labor practices of Respondent described above affect commerce within the meaning of §§ 2(6) and (7) of the Act.

WHEREFORE, as part of the remedy for Respondent's unfair labor practices alleged above in paragraph 7, the General Counsel seeks an order making Charging Party Foster whole for any loss of earnings and other benefits suffered as a result of Respondent's discrimination, including all search-for-work and work-related expenses as well as reasonable consequential damages incurred by him as a result of the Respondent's unlawful conduct. The General Counsel further seeks an order requiring reimbursement of amounts equal to the difference in taxes owed upon receipt of a lump-sum payment and taxes that would have been owed had there been no discrimination.,

WHEREFORE, as part of the remedy for Respondent's unfair labor practices alleged above in paragraphs 8 and 9, the General Counsel further seeks an Order requiring Respondent to restore the *status quo ante* and make whole any employees adversely affected by the aforementioned conduct. The General Counsel further seeks all other relief as may be just and proper to remedy the unfair labor practices alleged.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to §§ 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the second consolidated complaint. The answer must be received by this office on or before **July 11, 2019**, or postmarked on or before **July 10, 2019**. Unless filed electronically in a pdf format, Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically by using the E-Filing system on the Agency's website. In order to file an answer electronically, access the Agency's website at http://www.nlrb.gov, click on E-Gov, then click on the E-Filing link on the pull-down menu. Click on the "File Documents" button under "Regional, Subregional and Resident Offices" and then follow the directions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. *See* § 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the document need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf document

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NOTICE OF RESCHEDULED HEARING

PLEASE TAKE NOTICE that, beginning on the **15th day of October, 2019,** at **9:00 a.m.,** and on consecutive days thereafter until concluded, at a location to be determined in **Pasco, Washington,** a hearing will be conducted before an Administrative Law Judge of the National Labor Relations Board. At the hearing Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this second consolidated complaint. The procedures to be followed at the hearing are described in the attached form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

DATED at Seattle, Washington, this 27th day of June, 2019.

R K Hooks

Ronald K. Hooks, Regional Director
National Labor Relations Board, Region 19
2948 Jackson Federal Building
915 Second Avenue
Seattle, Washington 98174

Attachments

Form NLRB-4668
(6-2014)

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The attached complaint has scheduled a hearing that will be conducted by an administrative law judge (ALJ) of the National Labor Relations Board who will be an independent, impartial finder of facts and applicable law. **You may be represented at this hearing by an attorney or other representative.** If you are not currently represented by an attorney, and wish to have one represent you at the hearing, you should make such arrangements as soon as possible. A more complete description of the hearing process and the ALJ's role may be found at Sections 102.34, 102.35, and 102.45 of the Board's Rules and Regulations. The Board's Rules and regulations are available at the following link: www.nlrb.gov/sites/default/files/attachments/basic-page/node-1717/rules_and_regs_part_102.pdf.

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II. DURING THE HEARING

The rules pertaining to the Board's hearing procedures are found at Sections 102.34 through 102.43 of the Board's Rules and Regulations. Please note in particular the following:

- **Witnesses and Evidence**: At the hearing, you will have the right to call, examine, and cross-examine witnesses and to introduce into the record documents and other evidence.

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(OVER)

in evidence. If a copy of any exhibit is not available when the original is received, it will be the responsibility of the party offering such exhibit to submit the copy to the ALJ before the close of hearing. If a copy is not submitted, and the filing has not been waived by the ALJ, any ruling receiving the exhibit may be rescinded and the exhibit rejected.

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- **Oral Argument:** You are entitled, on request, to a reasonable period of time at the close of the hearing for oral argument, which shall be included in the transcript of the hearing. Alternatively, the ALJ may ask for oral argument if, at the close of the hearing, if it is believed that such argument would be beneficial to the understanding of the contentions of the parties and the factual issues involved.

- **Date for Filing Post-Hearing Brief**: Before the hearing closes, you may request to file a written brief or proposed findings and conclusions, or both, with the ALJ. The ALJ has the discretion to grant this request and to will set a deadline for filing, up to 35 days.

III. AFTER THE HEARING

The Rules pertaining to filing post-hearing briefs and the procedures after the ALJ issues a decision are found at Sections 102.42 through 102.48 of the Board's Rules and Regulations. Please note in particular the following:

- **Extension of Time for Filing Brief with the ALJ:** If you need an extension of time to file a post-hearing brief, you must follow Section 102.42 of the Board's Rules and Regulations, which requires you to file a request with the appropriate chief or associate chief administrative law judge, depending on where the trial occurred. You must immediately serve a copy of any request for an extension of time on all other parties and furnish proof of that service with your request. You are encouraged to seek the agreement of the other parties and state their positions in your request.

- **ALJ's Decision:** In due course, the ALJ will prepare and file with the Board a decision in this matter. Upon receipt of this decision, the Board will enter an order transferring the case to the Board and specifying when exceptions are due to the ALJ's decision. The Board will serve copies of that order and the ALJ's decision on all parties.

- **Exceptions to the ALJ's Decision**: The procedure to be followed with respect to appealing all or any part of the ALJ's decision (by filing exceptions with the Board), submitting briefs, requests for oral argument before the Board, and related matters is set forth in the Board's Rules and Regulations, particularly in Section 102.46 and following sections. A summary of the more pertinent of these provisions will be provided to the parties with the order transferring the matter to the Board.

FORM NLRB 4338
(6-90)

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
NOTICE

Cases 19-CA-230472, et al.

The issuance of the notice of formal hearing in this case does not mean that the matter cannot be disposed of by agreement of the parties. On the contrary, it is the policy of this office to encourage voluntary adjustments. The examiner or attorney assigned to the case will be pleased to receive and to act promptly upon your suggestions or comments to this end.

An agreement between the parties, approved by the Regional Director, would serve to cancel the hearing. However, unless otherwise specifically ordered, the hearing will be held at the date, hour, and place indicated. Postponements ***will not be granted*** unless good and sufficient grounds are shown ***and*** the following requirements are met:

(1) The request must be in writing. An original and two copies must be filed with the Regional Director when appropriate under 29 CFR 102.16(a) or with the Division of Judges when appropriate under 29 CFR 102.16(b).

(2) Grounds must be set forth in ***detail***;

(3) Alternative dates for any rescheduled hearing must be given;

(4) The positions of all other parties must be ascertained in advance by the requesting party and set forth in the request; and

(5) Copies must be simultaneously served on all other parties (listed below), and that fact must be noted on the request.

Except under the most extreme conditions, no request for postponement will be granted during the three days immediately preceding the date of hearing.

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Exhibit C

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

OXARC, INC.	
and	Cases 19-CA-230472
TEAMSTERS LOCAL 839	
and	19-CA-237336 19-CA-237499 19-CA-238503
TEAMSTERS LOCAL 690	
and	19-CA-248391
INTERNATIONAL BROTHERHOOD OF TEAMSTERS	
and	19-CA-232728
JARED FOSTER, an Individual	

ORDER FURTHER CONSOLIDATING CASES, THIRD CONSOLIDATED COMPLAINT, AND NOTICE OF RESCHEDULED HEARING

On June 27, 2019, a Second Consolidated Complaint and Notice of Hearing issued in Cases 19-CA-230472, 19-CA-232728, 19-CA-237336, 19-CA-237499, and 19-CA-238503, based on charges filed respectively by Teamsters Local 839, Teamsters Local 690, and Jared Foster ("Foster"), an Individual, against Oxarc, Inc. ("Respondent"), alleging that Respondent engaged in unfair labor practices that violate the National Labor Relations Act (the "Act"), 29 U.S.C. § 151 *et seq.* Pursuant to § 102.33 of the Rules and Regulations of the National Labor Relations Board (the "Board") and to avoid unnecessary costs or delay, IT IS ORDERED THAT those cases are further consolidated

with Case 19-CA-248391, filed by the International Brotherhood of Teamsters, which alleges that Respondent has engaged in further unfair labor practices within the meaning of the Act.

This Third Consolidated Complaint and Notice of Rescheduled Hearing, issued pursuant to § 10(b) of the Act and § 102.15 of the Board's Rules and Regulations, is based on these further consolidated cases and alleges that Respondent has violated the Act as described below.

1.

(a) The charge in Case 19-CA-230472 was filed by Teamsters Local 839 on November 5, 2018, and a copy was served on Respondent by regular mail on that day.

(b) The charge in Case 19-CA-232728 was filed by Foster on December 11, 2018, and a copy was served on Respondent by regular mail on December 13, 2018.

(c) The charge in Case 19-CA-237336 was filed by the Teamsters Local 690 on March 6, 2019, and a copy was served on Respondent by regular mail on that day.

(d) The charge in Case 19-CA-237449 was filed by Teamsters Local 690 on March 8, 2019, and a copy was served on Respondent by regular mail on March 12, 2019.

(e) The charge in Case 19-CA-238503 was filed by Teamsters Local 690 on March 26, 2019, and a copy was served on Respondent by regular mail on March 27, 2019.

(f) The charge in Case 19-CA-248391 was filed by the International Brotherhood of Teamsters on September 16, 2019, and a copy was served on Respondent by regular mail on September 17, 2019.

2.

(a) At all material times, Respondent has been a State of Washington corporation with an office and place of business in Pasco, Washington (the "Facility"), engaged in the business of providing welding and industrial supplies, safety products and training, as well as industrial, medical, and specialty gasses.

(b) In conducting its operations described above in paragraph 2(a) during the past 12 months, a representative period, Respondent had gross revenues in excess of $500,000.

(c) In conducting its operations described above in paragraph 2(a) during the past 12 months, a representative period, Respondent purchased and received at the Facility goods valued in excess of $50,000 directly from points located outside the State of Washington.

(d) At all material times, Respondent has been an employer engaged in commerce within the meaning of §§ 2(2), (6), and (7) of the Act.

3.

(a) At all material times, the International Brotherhood of Teamsters has been a labor organization within the meaning of § 2(5) of the Act.

(b) At all material times, Teamsters Local 839, a local of the International Brotherhood of Teamsters, has been a labor organization within the meaning of § 2(5) of the Act.

(c) At all material times, Teamsters Local 690, a local of the International Brotherhood of Teamsters, has been a labor organization within the meaning of § 2(5) of the Act.

(d) At all material times, Teamsters Local 760, a local of the International Brotherhood of Teamsters, has been a labor organization within the meaning of § 2(5) of the Act.

4.

At all material times, the following individuals held the positions set forth opposite their names and have been supervisors of Respondent within the meaning of § 2(11) of the Act and/or agents of Respondent within the meaning of § 2(13) of the Act:

Kelly Bladow	--	Regional Operations Manager
Jenna Fitzgerald	--	Fleet Director, Insurance and Payroll
Jud Grubbs	--	Labor Consultant/Bargaining Spokesperson
Jason Kirby	--	Vice President and General Manager
James Paradis	--	Manager

5.

(a) The following employees of Respondent (the "Unit") constitute a unit appropriate for the purposes of collective bargaining within the meaning of § 9(b) of the Act:

> All drivers employed by Respondent at its various facilities throughout Washington, Idaho, and Oregon within the jurisdictions of Teamsters Locals 690, 760, and 839 (the "Unions"); but excluding all other employees, and guards and supervisors as defined by the Act.

(b) At all material times since at least 1990, Respondent has recognized the Unions as the exclusive collective-bargaining representative of the Unit. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective from June 1, 2012, to May 31, 2017.

(c) At all material times, based on § 9(a) of the Act, the Unions have been the exclusive collective-bargaining representative of the Unit.

6.

On about June 4, 2018, Respondent, by Fitzgerald and/or Kirby at the Facility, interrogated its employees about their feelings concerning Respondent's collective bargaining proposals.

7.

(a) On June 14, 2018, Respondent discharged its employee Foster.

(b) Respondent engaged in the conduct described above in paragraph 7(a) because Foster engaged in Union and/or protected concerted activities, and to discourage employees from engaging in these or other Union or protected, concerted activities.

8.

(a) At various times from about April 2017 through February 28, 2019, Respondent and the Unions met for the purposes of negotiating a successor collective-bargaining agreement to the agreement described above in paragraph 5(b).

(b) On February 28, 2019, Respondent provided the Unions with its last, best, and final offer ("LBFO").

(c) On February 28, 2019, while bargaining between Respondent and the Unions for a successor contract as described above in paragraph 8(a) was ongoing, Respondent declared impasse.

(d) On March 11, 2019, Respondent implemented portions of its LBFO as well as terms and conditions of employment not contained in its LBFO.

(e) On August 22, 2019, the Unions, by letter, requested additional bargaining dates with Respondent.

(f) On August 27, 2019, and continuing to date, Respondent, by letter from Grubbs, refused to meet with the Unions for the purposes of collective bargaining unless the Unions provided written proposals in advance of bargaining and/or identified areas in which it was willing to change its previously stated bargaining positions and proposals.

(g) The subjects set forth above in paragraph 8(d) and 8(f) relate to the wages, hours, and other terms and conditions of employment of the Unit and are mandatory subjects for the purposes of collective bargaining.

(h) Respondent engaged in the conduct described above in paragraphs 8(d) and 8(f) without first bargaining with the Unions to a good faith impasse, and at a time when no overall impasse had been reached on bargaining for a successor agreement as a whole.

(i) Additionally, and regardless of whether the parties reached an overall impasse in bargaining, Respondent unlawfully and unilaterally implemented the following terms and conditions of employment for the Unit on March 11, 2019: a no-strike clause, a fixed term of the agreement, a grievance and arbitration provision, a provision barring requests for increases in health benefits, a merit wage system, as well as the versions of the 401(k) and health plans that differed from the LBFO.

9.

(a) In about late-December 2018, a date unknown to the General Counsel but within the knowledge of Respondent, Respondent began making employees pay for required Company-issued work boots in excess of $135.

(b) On March 6, 2018, Respondent began prohibiting employees from wearing non-Respondent logo hats and hear wear, including employees wearing Union-logo hats.

(c) Respondent engaged in the conduct described above in paragraph 9(a) and 9(b) without prior notice to the Unions and without affording the Unions an opportunity to bargain with Respondent with respect to the above conduct and/or the effects of this conduct.

(d) Respondent engaged in the conduct described above in paragraph 9(b) because employees of the Unit engaged in Union and/or protected concerted activities, including wearing Union-log hats at work.

10.

By the conduct described above in paragraphs 6, 7, and 9(b), Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in § 7 of the Act in violation of § 8(a)(1) of the Act.

11.

By the conduct described above in paragraph 7, Respondent has been discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of §§ 8(a)(1) and (3) of the Act.

12.

By the conduct described above in paragraphs 8 and 9, Respondent has been failing and refusing to bargain collectively with the Union as the exclusive collective-bargaining representative of its Unit employees in violation of §§ 8(a)(1) and (5) of the Act.

13.

The unfair labor practices of Respondent described above affect commerce within the meaning of §§ 2(6) and (7) of the Act.

WHEREFORE, as part of the remedy for Respondent's unfair labor practices alleged above in paragraph 7, the General Counsel seeks an order making Charging Party Foster whole for any loss of earnings and other benefits suffered as a result of Respondent's discrimination, including all search-for-work and work-related expenses as well as reasonable consequential damages incurred by him as a result of the Respondent's unlawful conduct. The General Counsel further seeks an order requiring reimbursement of amounts equal to the difference in taxes owed upon receipt of a lump-sum payment and taxes that would have been owed had there been no discrimination.,

WHEREFORE, as part of the remedy for Respondent's unfair labor practices alleged above in paragraphs 8 and 9, the General Counsel further seeks an Order requiring Respondent to restore the *status quo ante* and make whole any employees adversely affected by the aforementioned conduct. The General Counsel further seeks all other relief as may be just and proper to remedy the unfair labor practices alleged.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to §§ 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the third consolidated complaint. The answer must be received by this office on or before **December 20, 2019**, or postmarked on or before **December 19, 2019**. Unless filed electronically in a pdf format, Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically by using the E-Filing system on the Agency's website. In order to file an answer electronically, access the Agency's website at http://www.nlrb.gov, click on E-Gov, then click on the E-Filing link on the pull-down menu. Click on the "File Documents" button under "Regional, Subregional and Resident Offices" and then follow the directions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. *See* § 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the document need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf document containing the required signature, then the E-filing rules require that such answer containing the required signature be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must be accomplished in conformance with the requirements of § 102.114 of the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed or if an answer is filed untimely, the Board may find,

pursuant to Motion for Default Judgment, that the allegations in the third consolidated complaint are true.

NOTICE OF RESCHEDULED HEARING

PLEASE TAKE NOTICE that, beginning on the **12th day of May, 2019, at 9:00 a.m.,** and on consecutive days thereafter until concluded, at a location to be determined in **Pasco, Washington,** a hearing will be conducted before an Administrative Law Judge of the National Labor Relations Board. At the hearing Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this third consolidated complaint. The procedures to be followed at the hearing are described in the attached form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

DATED at Seattle, Washington, this 6th day of December, 2019.

R/H/Hooks

Ronald K. Hooks, Regional Director
National Labor Relations Board, Region 19
2948 Jackson Federal Building
915 Second Avenue
Seattle, Washington 98174

Attachments

Form NLRB-4668
(6-2014)

Procedures in NLRB Unfair Labor Practice Hearings

The attached complaint has scheduled a hearing that will be conducted by an administrative law judge (ALJ) of the National Labor Relations Board who will be an independent, impartial finder of facts and applicable law. **You may be represented at this hearing by an attorney or other representative.** If you are not currently represented by an attorney, and wish to have one represent you at the hearing, you should make such arrangements as soon as possible. A more complete description of the hearing process and the ALJ's role may be found at Sections 102.34, 102.35, and 102.45 of the Board's Rules and Regulations. The Board's Rules and regulations are available at the following link: www.nlrb.gov/sites/default/files/attachments/basic-page/node-1717/rules_and_regs_part_102.pdf.

The NLRB allows you to file certain documents electronically and you are encouraged to do so because it ensures that your government resources are used efficiently. To e-file go to the NLRB's website at www.nlrb.gov, click on "e-file documents," enter the 10-digit case number on the complaint (the first number if there is more than one), and follow the prompts. You will receive a confirmation number and an e-mail notification that the documents were successfully filed.

Although this matter is set for trial, this does not mean that this matter cannot be resolved through a settlement agreement. The NLRB recognizes that adjustments or settlements consistent with the policies of the National Labor Relations Act reduce government expenditures and promote amity in labor relations and encourages the parties to engage in settlement efforts.

I. BEFORE THE HEARING

The rules pertaining to the Board's pre-hearing procedures, including rules concerning filing an answer, requesting a postponement, filing other motions, and obtaining subpoenas to compel the attendance of witnesses and production of documents from other parties, may be found at Sections 102.20 through 102.32 of the Board's Rules and Regulations. In addition, you should be aware of the following:

- **Special Needs:** If you or any of the witnesses you wish to have testify at the hearing have special needs and require auxiliary aids to participate in the hearing, you should notify the Regional Director as soon as possible and request the necessary assistance. Assistance will be provided to persons who have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.603.

- **Pre-hearing Conference:** One or more weeks before the hearing, the ALJ may conduct a telephonic prehearing conference with the parties. During the conference, the ALJ will explore whether the case may be settled, discuss the issues to be litigated and any logistical issues related to the hearing, and attempt to resolve or narrow outstanding issues, such as disputes relating to subpoenaed witnesses and documents. This conference is usually not recorded, but during the hearing the ALJ or the parties sometimes refer to discussions at the pre-hearing conference. You do not have to wait until the prehearing conference to meet with the other parties to discuss settling this case or any other issues.

II. DURING THE HEARING

The rules pertaining to the Board's hearing procedures are found at Sections 102.34 through 102.43 of the Board's Rules and Regulations. Please note in particular the following:

- **Witnesses and Evidence**: At the hearing, you will have the right to call, examine, and cross-examine witnesses and to introduce into the record documents and other evidence.

- **Exhibits: Each exhibit offered in evidence must be provided in duplicate to the court reporter and a copy of each of each exhibit should be supplied to the ALJ and each party when the exhibit is offered**

(OVER)

in evidence. If a copy of any exhibit is not available when the original is received, it will be the responsibility of the party offering such exhibit to submit the copy to the ALJ before the close of hearing. If a copy is not submitted, and the filing has not been waived by the ALJ, any ruling receiving the exhibit may be rescinded and the exhibit rejected.

- **Transcripts**: An official court reporter will make the only official transcript of the proceedings, and all citations in briefs and arguments must refer to the official record. The Board will not certify any transcript other than the official transcript for use in any court litigation. Proposed corrections of the transcript should be submitted, either by way of stipulation or motion, to the ALJ for approval. Everything said at the hearing while the hearing is in session will be recorded by the official reporter unless the ALJ specifically directs off-the-record discussion. If any party wishes to make off-the-record statements, a request to go off the record should be directed to the ALJ.

- **Oral Argument:** You are entitled, on request, to a reasonable period of time at the close of the hearing for oral argument, which shall be included in the transcript of the hearing. Alternatively, the ALJ may ask for oral argument if, at the close of the hearing, if it is believed that such argument would be beneficial to the understanding of the contentions of the parties and the factual issues involved.

- **Date for Filing Post-Hearing Brief**: Before the hearing closes, you may request to file a written brief or proposed findings and conclusions, or both, with the ALJ. The ALJ has the discretion to grant this request and to will set a deadline for filing, up to 35 days.

III. AFTER THE HEARING

The Rules pertaining to filing post-hearing briefs and the procedures after the ALJ issues a decision are found at Sections 102.42 through 102.48 of the Board's Rules and Regulations. Please note in particular the following:

- **Extension of Time for Filing Brief with the ALJ:** If you need an extension of time to file a post-hearing brief, you must follow Section 102.42 of the Board's Rules and Regulations, which requires you to file a request with the appropriate chief or associate chief administrative law judge, depending on where the trial occurred. You must immediately serve a copy of any request for an extension of time on all other parties and furnish proof of that service with your request. You are encouraged to seek the agreement of the other parties and state their positions in your request.

- **ALJ's Decision:** In due course, the ALJ will prepare and file with the Board a decision in this matter. Upon receipt of this decision, the Board will enter an order transferring the case to the Board and specifying when exceptions are due to the ALJ's decision. The Board will serve copies of that order and the ALJ's decision on all parties.

- **Exceptions to the ALJ's Decision**: The procedure to be followed with respect to appealing all or any part of the ALJ's decision (by filing exceptions with the Board), submitting briefs, requests for oral argument before the Board, and related matters is set forth in the Board's Rules and Regulations, particularly in Section 102.46 and following sections. A summary of the more pertinent of these provisions will be provided to the parties with the order transferring the matter to the Board.

FORM NLRB 4338
(6-90)

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
NOTICE

Cases 19-CA-230472, et al.

The issuance of the notice of formal hearing in this case does not mean that the matter cannot be disposed of by agreement of the parties. On the contrary, it is the policy of this office to encourage voluntary adjustments. The examiner or attorney assigned to the case will be pleased to receive and to act promptly upon your suggestions or comments to this end.

An agreement between the parties, approved by the Regional Director, would serve to cancel the hearing. However, unless otherwise specifically ordered, the hearing will be held at the date, hour, and place indicated. Postponements ***will not be granted*** unless good and sufficient grounds are shown ***and*** the following requirements are met:

(1) The request must be in writing. An original and two copies must be filed with the Regional Director when appropriate under 29 CFR 102.16(a) or with the Division of Judges when appropriate under 29 CFR 102.16(b).

(2) Grounds must be set forth in ***detail***;

(3) Alternative dates for any rescheduled hearing must be given;

(4) The positions of all other parties must be ascertained in advance by the requesting party and set forth in the request; and

(5) Copies must be simultaneously served on all other parties (listed below), and that fact must be noted on the request.

Except under the most extreme conditions, no request for postponement will be granted during the three days immediately preceding the date of hearing.

CERTIFIED MAIL NO.
7018 0360 0000 6458 2464

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REGIONAL MANAGER
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IMPORTANT NOTICE

The date which has been set for hearing in this matter should be checked immediately. If there is proper cause for not proceeding with the hearing on that date, a motion to change the date of hearing should be made within ten (10) days from the issuance of the Complaint. Thereafter, the Regional Office will assume that the scheduled hearing date has been agreed upon and that all parties will be prepared to proceed to the hearing on that date. Also, note the attached new Rules pertaining to continuances.

All parties are encouraged to explore fully the possibilities of settlement. Early settlement agreements prior to extensive and costly trial preparation may result in substantial savings of time, money and personnel resources for all parties. The Board agent assigned to this case will be happy to discuss settlement at any mutually convenient time.

Anne Pomerantz, Regional Attorney
National Labor Relations Board, Region 19
2948 Jackson Federal Building
915 Second Avenue
Seattle, Washington 98174

NATIONAL LABOR RELATIONS BOARD

29 CFR Part 102

Rescheduling Unfair Labor Practice Hearings

AGENCY: National Labor Relations Board.

ACTION: Final rule.

SUMMARY: The National Labor Relations Board issues a final rule permanently implementing its recent experimental modification of the procedures for rescheduling unfair labor practice hearings. The procedures are permanently modified so that the authority to reschedule hearings is transferred, subject to certain exceptions, from the Regional Directors to the administrative law judges.

EFFECTIVE DATE: December 1, 1989.

FOR FURTHER INFORMATION CONTACT: John C. Truesdale, Executive Secretary, 1717 Pennsylvania Avenue NW., Room 701, Washington, DC 20570, Telephone: (202) 254-9430.

SUPPLEMENTAL INFORMATION: On August 1, 1988, the National Labor Relations Board implemented a one-year experiment in all of its Regional Offices whereby the authority to reschedule unfair labor practice hearings was transferred, subject to certain exceptions, from the Regional Directors to the administrative law judges. (See 53 FR 26348). The experiment was subsequently extended until November 30, 1989 (see 54 FR 31392), and a comment period was provided until October 2, 1989 (see 54 FR 37039).

The Board received comments by the Acting Associate General Counsel, from the Deputy Chief Administrative Law Judge, and from several private law firms or attorneys that practice before the Agency. Each are summarized below.

Acting Associate General Counsel

The comments by Acting Associate General Counsel William G. Stack indicated that, although most of the Regional Offices opposed the experimental rescheduling system, the data which they had accumulated during the experimental period showed that the experiment had actually had "minimal impact" on their case processing. Thus, given the Board's expressed concern about the public's perception of the fairness of the old system, the Acting Associate General Counsel concluded that "permanently instituting the new system may create a more favorable image of the Agency with little, if any, adverse affect on casehandling."

Deputy Chief Administrative Law Judge

The comments from Deputy Chief Administrative Law Judge David S. Davidson indicated that while the experimental procedure had "somewhat increased" the workload of the administrative law judges, "most of the [rescheduling] requests require little time for disposition, and continuation of the procedure would present no problem" for the judges. However, noting that a postponement was virtually automatic in cases where there was no objection to the request, the Deputy Chief Administrative Law Judge suggested that an additional exception might be allowed to permit the Regional Directors to reschedule the hearing in such cases. Such an exception, the Deputy Chief Administrative Law Judge concluded, "would significantly reduce the number of requests coming to [the administrative law judges] and should have little impact on public perception of fairness."

Private Practitioners

Four comments were received from private law firms or attorneys that practice before the Agency. Two of these comments, from Edward Miller, former NLRB chairman and now Senior Counsel of Pope, Ballard, Shepard & Fowle, Ltd., and from Dean Denlinger of Denlinger, Rosenthal & Greenberg, were submitted at the outset of the experiment. Former Chairman Miller indicated that, although he had some concerns about how some of the exceptions would be applied, he was supportive of the experiment. Denlinger indicated that he generally supported the changes in the experimental procedure and recommended that the changes be made permanent, but urged that the exceptions in the experimental rule be eliminated and that all decisions concerning the rescheduling of hearings be made by the administrative law judges. The two other comments were submitted by G. Roger King of Bricker & Eckler, and Fred F. Holroyd of Holroyd, Yost & Merical. G. Roger King indicated that Bricker & Eckler was supportive of the experimental procedure, and recommended that the experiment "be made permanent." Fred F. Holroyd indicated that while he was also supportive of changing the old procedure, he could see "no difference in the actual practice from the old system to the new," and recommended that the authority to reschedule hearings be transferred to the administrative law judges without exception.

Having considered all of the above comments, the Board has decided to make the experimental rescheduling procedure permanent. Virtually all of the comments indicate that the experimental procedure will help at least in some degree to change the apparent public perception of unfairness in this area. Accordingly, we conclude that the experimental procedure will serve its stated purpose and should be permanently implemented in a final rule.

We will, however, make one change in the experimental procedure. In agreement with Deputy Chief Administrative Law Judge Davidson, we see no reason not to permit the Regional Directors to continue to reschedule hearings in those instances where there is no objection. Accordingly, we will incorporate this change into the final rule.

Pursuant to section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.), the Board certifies that the rule will not have a significant impact on a substantial number of small businesses

List of Subjects in 29 CFR Part 102

Administrative practice and procedure, labor management relations.

Accordingly, 29 CFR part 102 is amended as follows:

PART 102—RULES AND REGULATIONS, SERIES 8

1. The authority citation for 29 CFR part 102 continues to read as follows:

Authority: Section 6, National Labor Relations Act, as amended (29 U.S.C. 151, 156). Section 102.117 also issued under section 552(a)(4)(A) of the Freedom of Information Act, as amended (5 U.S.C. 552(a)(4)(A)). Sections 102.143 through 102.155 also issued under section 504(c)(1) of the Equal Access to Justice Act, as amended (5 U.S.C. 504(c)(1).

2. Sections 102.16 and 102.24(a) are revised to read as follows:

§ 102.16 Hearing; change of date or place.

(a) Upon his own motion or upon proper cause shown by any other party, the Regional Director issuing the complaint may extend the date of such hearing or may change the place at which it is to be held, except that the authority of the Regional Director to extend the date of a hearing shall be limited to the following circumstances:

(1) Where all parties agree or no party objects to extension of the date of hearing;

(2) Where a new charge or charges have been filed which, if meritorious, might be appropriate for consolidation with the pending complaint;

(3) Where negotiations which could lead to settlement of all or a portion of the complaint are in progress;

(4) Where issues related to the complaint are pending before the General Counsel's Division of Advice or Office of Appeals; or

(5) Where more than 21 days remain before the scheduled date of hearing.

(b) Where in circumstances other than those set forth in subsection (a) of this section, motions to reschedule the hearing should be filed with the Division of Judges in accordance with section 102.24(a). When a motion to reschedule has been granted, the Regional Director issuing the complaint shall retain the authority to order a new date for hearing and retain the responsibility to make the necessary arrangements for conducting such hearing, including its location and the transcription of the proceedings.

§ 102.24 Motions; where to file; contents; service on other parties; promptness in filing and response; summary judgment procedures

(a) All motions under § 102.22 and 102.29 made prior to the hearing shall be filed in writing with the Regional Director issuing the complaint. All motions for summary judgment or dismissal made prior to the hearing shall be filed in writing with the Board pursuant to the provisions of § 102.50. All other motions made prior to the hearing, including motions to reschedule the hearing under circumstances other than those set forth in § 102.16(a), shall be filed in writing with the chief administrative law judge in Washington, DC, with the deputy chief judge in San Francisco, California, with the associate chief judge in New York, New York, or with the associate chief judge in Atlanta, Georgia, as the case may be. All motions made at the hearing shall be made in writing to the administrative law judge or stated orally on the record. All motions filed subsequent to the hearing, but before the transfer of the case to the Board pursuant to § 102.45, shall be filed with the administrative law judge, care of the chief administrative law judge in Washington, DC, the deputy chief judge in San Francisco, California, the associate chief judge in New York, New York, or the associate chief judge in Atlanta, Georgia, as the case may be. Motions shall briefly state the order or relief applied for and the grounds therefor. All motions filed with a Regional Director or an administrative law judge as set forth above shall be filed therewith by transmitting three copies thereof together with an affidavit of service on the parties. All motions filed with the Board, including motions for summary judgment or dismissal, shall be filed with the Executive Secretary of the Board in Washington, DC, by transmitting eight copies thereof together with an affidavit of service on the parties. Unless otherwise provided in these rules, motions and responses thereto shall be filed promptly and within such time as not to delay the proceeding.

* * * * *

Dated, Washington, DC, December 1, 1989.

By direction of the Board.

John C. Truesdale,

Executive Secretary, National Labor Relations Board.

[FR Doc. 89-29172 Filed 12-12-89; 8:45 am]

BILLING CODE 7545-01-M

Exhibit D

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

OXARC, INC.

and **Case 19-CA-230472**

TEAMSTERS LOCAL 839

and **Case 19-CA-232728**

JARED FOSTER, an Individual

ORDER RESCHEDULING HEARING

At the request of Respondent and with the consent of the parties, for good cause shown,

IT IS HEREBY ORDERED that the hearing in the above-entitled matter is rescheduled from July 9, 2019 at 9:00 a.m. to 9:00 a.m. on **September 25, 2019,** at a place to be determined later in Pasco, Washington. The hearing will continue on consecutive days thereafter until concluded.

DATED at Seattle, Washington, this 27th day of March, 2019.

RONALD K. HOOKS, REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 19
915 2nd Ave Ste 2948
Seattle, WA 98174-1006

G. C. Exhibit 1(p)

Exhibit E

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

OXARC, INC.

and **Cases 19-CA-230472**

TEAMSTERS LOCAL 839 **19-CA-237336**
19-CA-237499
TEAMSTERS LOCAL 690 **19-CA-238503**

and **19-CA-232728**

JARED FOSTER, an Individual

SECOND ORDER RESCHEDULING HEARING

Due to the filing of a new, related charge in Case 19-CA-248391,

IT IS HEREBY ORDERED the hearing in the above-entitled matter is rescheduled from October 15, 2019, to 9:00 a.m. on April 21, 2020, in the Franklin County Courthouse, in a Courtroom TBA a day before the hearing, 1016 N. 4th Avenue, Pasco, Washington 99301. The hearing will be held on consecutive days thereafter until concluded.

DATED at Seattle, Washington, this 18th day of September, 2019.

ANNE POMERANTZ
ACTING REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 19
915 2nd Ave Ste 2948
Seattle, WA 98174-1006

G. C. Exhibit 1(w)

Exhibit F

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

OXARC, INC.	:	
	:	
and	:	CASES 19-CA-230472; 19-CA-237336;
	:	19-CA-237499; 19-CA-238503;
	:	19-CA-232728; 19-CA-248391
TEAMSTERS LOCAL 839	:	
	:	
and	:	
TEAMSTERS LOCAL 690	:	
	:	
and	:	
	:	
INTERNATIONAL BROTHERHOOD OF TEAMSTERS	:	
	:	
and	:	
	:	
JARED FOSTER, an individual	:	

RESPONDENT'S ANSWER TO THIRD CONSOLIDATED COMPLAINT AND AFFIRMATIVE DEFENSES

COMES NOW, OXARC, INC. ("Oxarc" or "Respondent"), by and through its undersigned counsel and pursuant to Section 102.23 of the Board's Rules and Regulations, timely files its Answer and Affirmative Defenses to the Third Consolidated Complaint issued by the Regional Director in the above-captioned cases on December 9, 2019.

AFFIRMATIVE DEFENSES

FIRST DEFENSE

To the extent that the Third Consolidated Complaint encompasses any allegations occurring more than six months prior to the filing of an underlying charge with the National Labor Relations Board ("NLRB" or the "Board") and the service of such charge upon Oxarc,

such allegations are time-barred by Section 10(b) of the National Labor Relations Act, as amended ("NLRA" or the "Act").

SECOND DEFENSE

To the extent that the Third Consolidated Complaint fails to give Oxarc fair and adequate notice of the underlying charges, it denies Oxarc its right to due process under the U.S. Constitution, its right to notice of the charges under Section 10 of the NLRA, and its right to notice and a fair hearing under the Board's Rules and Regulations.

THIRD DEFENSE

The Third Consolidated Complaint is invalid to the extent that any alleged agents of Oxarc committed acts that are ultimately determined to be outside the scope of their employment, or to the extent that they were never directed, authorized, or permitted thereby.

FOURTH DEFENSE

The Third Consolidated Complaint is invalid to the extent it fails to state a claim upon which relief may be granted.

FIFTH DEFENSE

The Third Consolidated Complaint is invalid to the extent that the General Counsel has pled legal conclusions rather than required factual allegations.

SIXTH DEFENSE

To the extent that supervisors and agents of Oxarc expressed only their views, arguments, or opinions, containing no threat of reprisal, promise of benefits, or suggestion of surveillance, such statements were protected in their entirety by Section 8(c) of the NLRA.

SEVENTH DEFENSE

The Third Consolidated Complaint is invalid to the extent that it contains allegations that were not included within a timely-filed, pending unfair labor practice charge against Oxarc.

EIGHTH DEFENSE

The Third Consolidated Complaint is invalid in that it is vague and imprecise with regard to the alleged actions of Oxarc.

NINTH DEFENSE

Oxarc lawfully implemented its Last, Best and Final Offer after the parties came to a lawful impasse.

TENTH DEFENSE

The Union has not made a substantial change in its bargaining position that would require the parties to reconvene negotiations.

ANSWERS TO NUMBERED AND UNNUMBERED PARAGRAPHS

1. (a) Responding to Paragraph 1(a) of the Third Consolidated Complaint, Oxarc admits that Teamsters Local 839 filed the unfair labor practice in Case 19-CA-230472 on November 5, 2018, but Oxarc has no knowledge as to the date on which the Board placed it in the mail.

(b) Responding to Paragraph 1(b) of the Third Consolidated Complaint, Oxarc admits that Jared Foster filed the unfair labor practice in Case 19-CA-232728 on December 11, 2018, but Oxarc has no knowledge as to the date on which the Board placed it in the mail.

(c) Responding to Paragraph 1(c) of the Third Consolidated Complaint, Oxarc admits that Teamsters Local 690 filed the unfair labor practice in Case 19-CA-237336 on March 6, 2019, but Oxarc has no knowledge as to the date on which the Board placed it in the mail.

(d) Responding to Paragraph 1(d) of the Third Consolidated Complaint, Oxarc admits that Teamsters Local 690 filed the unfair labor practice in Case 19-CA-237449 on March 8, 2019, but Oxarc has no knowledge as to the date on which the Board placed it in the mail.

(e) Responding to Paragraph 1(e) of the Third Consolidated Complaint, Oxarc admits that Teamsters Local 690 filed the unfair labor practice in Case 19-CA-238503 on March 26, 2019, but Oxarc has no knowledge as to the date on which the Board placed it in the mail.

(f) Responding to Paragraph 1(f) of the Third Consolidated Complaint, Oxarc admits that the International Brotherhood of Teamsters filed the unfair labor practice in Case 19-CA-248391 on September 16, 2019, but Oxarc has no knowledge as to the date on which the Board placed it in the mail.

2. Responding to Paragraphs 2(a) through (d) of the Third Consolidated Complaint, Oxarc admits the allegations therein.

3. Responding to Paragraph 3(a) through (c) of the Third Consolidated Complaint, Oxarc admits the allegations therein.

4. Responding to Paragraph 4 of the Third Consolidated Complaint, Oxarc denies the allegations therein. By way of further response, Kelly Bladow holds the position of Regional Operations Manager, Jenna Fitzgerald holds the position of Fleet Director, Insurance and Payroll, Jason Kirby holds the position of Vice President and General Manager and James Paradis holds the position of Plant Manager. Jud Grubbs is a labor consultant, but not an employee of Oxarc.

5. (a) Responding to Paragraph 5(a) of the Third Consolidated Complaint, Oxarc admits the allegations contained therein.

(b) Responding to Paragraph 5(b) of the Third Consolidated Complaint, Oxarc

admits that it has recognized the Union as the exclusive collective-bargaining representative of Unit which has been recognized in successive collective-bargaining agreements. Oxarc denies that the most recent collective-bargaining agreement expired on May 31, 2017. By way of further response, following a lawful declaration of impasse, Oxarc implemented its LBFO which is now the collective-bargaining agreement in effect.

6. Responding to Paragraph 6 of the Third Consolidated Complaint, Oxarc denies the allegations contained therein.

7. (a) Responding to Paragraph 7(a) of the Third Consolidated Complaint, Oxarc admits the allegations contained therein.

(b) Responding to Paragraph 7(b) of the Third Consolidated Complaint, Oxarc denies the allegations contained therein.

8. (a) Responding to Paragraph 8(a) of the Third Consolidated Complaint, Oxarc admits the allegations contained therein.

(b) Responding to Paragraph 8(b) of the Third Consolidated Complaint, Oxarc admits the allegations contained therein.

(c) Responding to Paragraph 8(c) of the Third Consolidated Complaint, Oxarc admits the allegations contained therein.

(d) Responding to Paragraph 8(d) of the Third Consolidated Complaint, Oxarc admits that on March 11, 2019 it implemented its LBFO. Oxarc denies the remaining allegations set forth in this paragraph.

(e) Responding to Paragraph 8(e) of the Third Consolidated Complaint, Oxarc admits only that on or about August 22, 2019, the Union requested to bargain with Respondent, but failed to offer any information related to any substantial change in its bargaining position. Oxarc denies the remaining allegations contained in this paragraph.

(f) Responding to Paragraph 8(f) of the Third Consolidated Complaint, Oxarc denies the allegations contained therein.

(g) Responding to Paragraph 8(g) of the Third Consolidated Complaint, Oxarc denies the allegations contained therein as conclusion of law and to the extent any of the statements therein contain factual allegations, they are denied.

(h) Responding to Paragraph 8(h) of the Third Consolidated Complaint, Oxarc denies the allegations contained therein as conclusion of law and to the extent any of the statements therein contain factual allegations, they are denied.

(i) Responding to Paragraph 8(i) of the Third Consolidated Complaint, Oxarc denies the allegations contained therein as conclusion of law and to the extent any of the statements therein contain factual allegations, they are denied.

9. (a) Responding to Paragraph 9(a) of the Third Consolidated Complaint, Oxarc denies the allegations contained therein.

(b) Responding to Paragraph 9(b) of the Third Consolidated Complaint, Oxarc denies the allegations contained therein.

(c) Responding to Paragraph 9(c) of the Third Consolidated Complaint, Oxarc denies the allegations contained therein.

(d) Responding to Paragraph 9(d) of the Third Consolidated Complaint, Oxarc denies the allegation

contained therein.

10. Responding to Paragraph 10 of the Third Consolidated Complaint, Oxarc denies the allegations contained therein as conclusion of law and to the extent any of the statements therein contain factual allegations, they are denied.

11. Responding to Paragraph 11 of the Third Consolidated Complaint, Oxarc denies the allegations contained therein as conclusion of law and to the extent any of the statements therein contain factual allegations, they are denied.

12. Responding to Paragraph 12 of the Third Consolidated Complaint, Oxarc denies the allegations contained therein as conclusion of law and to the extent any of the statements therein contain factual allegations, they are denied.

13. Responding to Paragraph 13 of the Third Consolidated Complaint, Oxarc denies the allegations contained therein as conclusion of law and to the extent any of the statements therein contain factual allegations, they are denied. Specifically, Oxarc denies that it was involved in any unfair labor practices.

WHEREFORE, having fully answered the Third Consolidated Complaint, Oxarc prays that it be dismissed in its entirety, or, in the alternative, that Counsel for the Regional Director be held to strict proof as to all allegations not specifically admitted.

Respectfully submitted this 20th day of December, 2019

Respectfully submitted,

Rick Grimaldi, Esq.
Samantha Sherwood Bononno, Esq.
FISHER & PHILLIPS LLP
150 N. Radnor Chester Road
Suite C300
Radnor, PA 19087
Telephone: (610) 230-2150
Facsimile: (610) 230-2151

ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

Pursuant to Section 102.114 of the *Board's Rules and Regulations,* I hereby certify that on the 20th day of December 2019, I e-filed *Respondent's Answer to the Third Consolidated Complaint and Affirmative Defenses* with the NATIONAL LABOR RELATIONS BOARD, and served a copy of the foregoing document to all parties in interest, as listed below:

Via First Class Mail

Jared Foster
6219 Wrigley Drive
Pasco, WA 99301

Austin DePaolo
Business Agent
Teamsters Local 839
1103 W. Sylvester Street
Pasco, WA 99301-4873

Larry Kroetch
Business Agent
Teamsters Local 690
1912 N. Division Street
Suite 200
Spokane, WA 99207-2271

David Jacobsen
International Brotherhood of Teamsters Local 174
14675 Interurban Avenue S., Ste. 303
Tukwila, WA 98168

Matthew Harris
Staff Attorney
International Brotherhood of Teamsters
25 Louisiana Ave. NW
Washington, DC 20001-2198

Via E-Mail

Adam D. Morrison
National Labor Relations Board
Spokane, WA Resident Agent, Region 19
P.O. Box 28447
Spokane, WA 99208
Adam.Morrison@nlrb.gov

Ronald K. Hooks, Regional Director
National Labor Relations Board, Region 19
2948 Jackson Federal Building
915 Second Avenue
Seattle, Washington, 98174-1078
ronald.hooks@nlrb.gov

Rick Grimaldi

Exhibit G

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

OXARC, INC.	
and	**Cases 19-CA-230472**
TEAMSTERS LOCAL 839	
and	**19-CA-237336** **19-CA-237499** **19-CA-238503**
TEAMSTERS LOCAL 690	
and	**19-CA-248391**
INTERNATIONAL BROTHERHOOD OF TEAMSTERS	
and	**19-CA-232728**
JARED FOSTER, an Individual	

THIRD ORDER RESCHEDULING HEARING

IT IS HEREBY ORDERED that, due to the on-going spread of COVID-19 and on-going containment efforts, the hearing in the above-entitled matter is rescheduled from May 12, 2020 at 9:00 AM to 9:00 AM on **August 4, 2020**, at a place to be determined in Pasco, Washington. The hearing will be held on consecutive days thereafter until concluded.

DATED at Seattle, Washington, this 15th day of April, 2020.

Ronald K. Hooks

Ronald K. Hooks, Regional Director
National Labor Relations Board, Region 19
915 2nd Ave., Ste. 2948
Seattle, WA 98174-1006

Exhibit H

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

OXARC, INC.		
and	**Cases**	**19-CA-230472**
TEAMSTERS LOCAL 839		
and		**19-CA-237336** **19-CA-237499** **19-CA-238503**
TEAMSTERS LOCAL 690		
and		**19-CA-248391**
INTERNATIONAL BROTHERHOOD OF TEAMSTERS		
and		**19-CA-232728**
JARED FOSTER, an Individual		

ORDER DIRECTING REMOTE HEARING VIA ZOOM

The hearing in the above-captioned case is currently scheduled to commence on August 4, 2020 in Pasco, Washington. On July 8, 2020, I conducted a conference call with the parties in this matter, which included counsel for the General Counsel, counsel for the Respondent employer, and counsel for the Charging Party union. It was agreed by all the parties that in view of the current COVID-19 pandemic, conducting an in-person hearing in the city of Pasco would not be feasible or safe, considering the current upsurge of COVID-19 cases in the area. Additionally, it was noted that this case had already been postponed on several occasions for various reasons, and that a further postponement at this time was not desirable or warranted. In view of these circumstances, the parties agreed that the best alternative at this time was to proceed to hold the hearing as scheduled by using the Zoom for Government videoconferencing platform ("Zoom").[1] In that regard, I note that the Board has recently held that the current pandemic clearly constitutes "good cause in compelling circumstances" under Section 102.35 (c) (1) of the Board's rules for taking individual witness testimony by videoconferencing. See *Morrison Healthcare*, 369 NLRB No. 76, slip op. at 2 (May 11, 2020).

[1] See the NLRB Division of Judges May 15, 2020 press release, at https://www.nlrb.gov/news-outreach/news-story/division-of-judges-will-resume-trials-effective-june-1-2020

Accordingly, and in light of the above, it is ordered that the August 4, 2020 hearing in this case will be conducted, absent settlement, via Zoom instead of an in-person hearing in Pasco, Washington. A prehearing conference will be held early on the week of July 27 to discuss the Zoom hearing protocols and procedures, particularly the production of subpoenaed documents and the sharing of exhibits. Written instructions and guidelines regarding the hearing protocols and procedures and public access to the hearing will be emailed to all the parties. Invitations containing Zoom hearing access links and numbers will likewise be emailed to all the parties, who will be responsible for forwarding those invitations to their potential witnesses. The parties will also be responsible for ensuring that the witnesses have the necessary equipment and internet connection to access the Zoom hearing in order to testify or otherwise participate in the hearing.

So Ordered.

Dated at San Francisco, California, this 9th day of July 2020.

Ariel L. Sotolongo
Administrative Law Judge.

Served by email upon the following:

For the NLRB Region 19:
Adam D. Morrison, Esq. Email: adam.morrison@nlrb.gov

For the Charging Party:
Matthew Harris, Staff Attorney, Email: mharris@teamster.org
(IBT)

For the Respondent:
Rick Grimaldi, Esq., Email: rgrimaldi@fisherphillips.com
Samantha S. Bononno, Esq., Email: sbononno@fisherphillips.com
(Fisher Phillips, LLP)

Exhibit I

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

OXARC, INC.	
And	**Cases 19-CA-230472**
TEAMSTERS LOCAL 839	
and	**19-CA-237336** **19-CA-237499** **19-CA-238503**
TEAMSTERS LOCAL 690	
and	**19-CA-248391**
INTERNATIONAL BROTHERHOOD OF TEAMSTERS	
and	**19-CA-232728**
JARED FOSTER, an Individual	

ORDER GRANTING MOTION TO CHANGE THE DATE OF THE HEARING

On July 14, 2020, the parties in the above-captioned matter jointly filed a Motion requesting that the hearing in this matter, currently scheduled to commence on Tuesday, August 4, 2020, at 9:00 a.m., Pacific time, be moved to Monday, August 3, 2020, at the same time.[1] In their joint Motion, the parties argue that in view of the fact that the hearing is expected to last 4 to 6 days, an earlier starting date might make it possible to conclude the hearing on the first week, rather than resuming the hearing on the week of August 17, as is currently planned. I concur.

[1] On July 9, 2020, I issued an Order directing that the hearing in this matter be held remotely via the Zoom video platform.

Accordingly, the Motion to commence the hearing on **Monday, August 3, 2020** at 9:00 a.m. Pacific time is **granted**. The General Counsel is directed to notify the court reporting service about this change.

So Ordered.

Dated at San Francisco, California, this 15th day of July 2020.

Ariel L. Sotolongo
Administrative Law Judge.

Served by email upon the following:

For the NLRB Region 19:
Adam D. Morrison, Esq.
Email: adam.morrison@nlrb.gov
Sarah McBride, Esq.,
Email:sarah.mcbride@nlrb.gov

For the Charging Party:
Matthew Harris, Staff Attorney,
Email: mharris@teamster.org (IBT)

For the Respondent:
Rick Grimaldi, Esq.,
Email: rgrimaldi@fisherphillips.com
Samantha S. Bononno, Esq.,
Email: sbononno@fisherphillips.com
(Fisher Phillips, LLP)

Exhibit J

From: McBride, Sarah M <Sarah.McBride@nlrb.gov>
Sent: Wednesday, July 15, 2020 7:57 PM
To: Grimaldi, Rick <rgrimaldi@fisherphillips.com>; Bononno, Samantha <sbononno@fisherphillips.com>
Cc: Morrison, Adam D. <Adam.Morrison@nlrb.gov>
Subject: Joint Exhibits for Oxarc Bargaining Communications

Rick and Samantha,

As we approach the trial date and I'm preparing our documents related to the bargaining allegations, I wanted to propose either joint exhibits or stipulations of authenticity regarding documents shared between the parties related to bargaining. Judge Sotolongo expressed a preference for joint exhibits, especially given the move to a Zoom hearing and the voluminous documents to be entered. I propose creating one pdf document of joint exhibits to include (1) all information requests and responses during the course of bargaining; (2) all Union proposals made during bargaining, at and away from the table; (3) all Respondent proposals made during the course of bargaining, at and away from the table; (4) all written communications between the parties regarding the LBFO and its implementation; (5) a summary chart of all bargaining dates. If you have an interest in this type of joint exhibit to be entered at the start of the hearing I would be happy to start putting it together and send a draft over for your review and input.

Ideally entering these communications as joint exhibits will save a great deal of time at the hearing and allow witnesses to testify more efficiently with the documents already admitted. Hopefully this will help us to finish the hearing in one week. None of the documents I am proposing to include should come as a surprise to either party as they have been communicated from one party to the other during bargaining. Of course, each side would introduce additional supporting documents through witnesses as well.

Please let me know if you would like me to draft a proposed joint exhibit document and I will send it over promptly so you have plenty of time to review.

Sarah McBride
Field Attorney
National Labor Relations Board l Region 19
2948 Jackson Federal Building l 915 Second Ave l Seattle, WA 98174
Office: (206)220 -6282 l Cell: (202)664-9925

Exhibit K

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

OXARC, INC.		
and	Cases	19-CA-230472
TEAMSTERS LOCAL 839		
and	Cases	19-CA-237336 19-CA-237499 19-CA-238503
TEAMSTERS LOCAL 690		
and		19-CA-248391
INTERNATIONAL BROTHERHOOD OF TEAMSTERS		
and		19-CA-232728
JARED FOSTER, An Individual		

Prehearing Order: Access, Instructions, and Guidelines Regarding Zoom Hearing

The following order addresses how identified participants and non-participant observers may access the scheduled Zoom unfair labor practice hearing on Monday, August 3, 2020 at 9:00 a.m. Pacific time. It also includes additional instructions and guidelines regarding the conduct of the Zoom hearing.

I. Participants

If you are an identified participant (counsel, representative, witness, interpreter, or court reporter), you may join the meeting online with a computer or laptop with a camera and microphone for transmitting both video and audio. (A computer or laptop with audio/video capability is highly recommended. It is possible to join the meeting online using a smart phone or tablet, but this will limit your ability to perform certain functions during the hearing, including sharing and viewing documents through Zoom.)

A Zoom account is required. If you do not already have an account, visit zoom.us and create one. You must sign up using your real name. Download and install the **free** Zoom client on your computer or laptop by hovering over the Resources tab in the upper right of the screen and selecting "Download Zoom Client." If you are using a smart phone, install Zoom from the App Store.

Join the Zoom meeting a few minutes before the scheduled time. You may do so by clicking on the "Join Zoom" link below. Alternatively, you can click on "Join a Meeting" in your Zoom app and enter the meeting code. If you are asked whether to open with the Zoom app or in the web browser, always choose to open with the Zoom app as this will allow you to participate more fully in the meeting than the browser.

When you enter, select "Join by Computer Audio" (even if you are connecting via a smart phone). You will be automatically placed in an online waiting room until admitted to the meeting. Please be patient, it may take several minutes. Avoid running unnecessary applications besides Zoom to conserve processing power and networking.
Judge Sotolongo is inviting you to a scheduled ZoomGov meeting.

Topic: Oxarc, Inc. Trial.
Time: This is a recurring meeting.

Join ZoomGov Meeting
https://www.zoomgov.com/j/1619352915?pwd=bkJoNVVGNmhnOTYrSEJXRC8xUWErdz09

Meeting ID: 161 935 2915
Password: 253628

One tap mobile
+16692545252,,1619352915#,,,,0#,,253628# US (San Jose)
+16468287666,,1619352915#,,,,0#,,253628# US (New York)

Dial by your location
+1 669 254 5252 US (San Jose)
+1 646 828 7666 US (New York)
833 568 8864 US Toll-free
Meeting ID: 161 935 2915
Password: 253628

Find your local number: https://www.zoomgov.com/u/ad30ptWesd

Join by SIP
1619352915@sip.zoomgov.com

Join by H.323
161.199.138.10 (US West)
161.199.136.10 (US East)
Meeting ID: 161 935 2915
Password: 253628

Join by Skype for Business
https://www.zoomgov.com/skype/1619352915

If you are unable to join the meeting either online or by phone, contact one of the other participants in the hearing or call Mark Eskenazi, at 202-273-1080 for assistance. Mr. Eskenazi

is an attorney in the Office of the Executive Secretary at the National Labor Relations Board. Mr. Eskenazi has been screened from working on this case if it comes before the Board. He will be serving as Courtroom Deputy to assist the trial judge with Zoom technical issues throughout the hearing. If you cannot reach Mr. Eskenazi, call the Judges Division at 202-501-8800 for assistance.

II. List of individuals who may join the meeting, including Non-participant Observers (public access)

No later than 9:00 am PT on Friday, July 31, 2020, counsel must email the Judge, Courtroom Deputy, and court reporter a list of all hearing participants to which counsel has sent the access information. This list is for procedural use only and will not be part of the record. The list must include the individual's name, email address, telephone number and role in the proceeding. This list is necessary for the Judge to allow the appropriate access to the proceedings and to correctly assign individuals to breakout rooms or the waiting room. However, parties will not be precluded from calling witnesses who are not on this list if necessary for the presentation of their case.

The parties must provide the identity and email addresses of any nonparticipant observers to the Regional Office no later than 9:00 am PT on Friday, July 31, 2020. It is the responsibility of the Regional Office to advise nonparticipant observers the manner in which they will be able to access the hearing. Identified nonparticipant observers may join the meeting with any of the above-mentioned devices in any of the above described ways. However, they must remain muted with their video output off throughout the hearing. They may not disrupt the hearing in any way. If they disrupt the hearing, or violate the judge's instructions, they may be subject to removal and other sanctions.

III. Additional Instructions and Guidelines

No videotaping or recording

DO NOT VIDEOTAPE, BROADCAST, TELEVISE, AUDIO RECORD, OR PHOTOGRAPH, INCLUDING TAKING SCREENSHOTS OR OTHER COPYING. RECORDING IS ONLY PERMITTED BY THE OFFICIAL COURT REPORTER. Violation of this rule or causing disruptions may result in removal and other sanctions.

Providing all potential exhibits to the Judge, Courtroom Deputy, your witnesses and opposing parties in advance of hearing

It would greatly facilitate the conduct of the hearing if the parties emailed all of their potential exhibits to the Judge, Courtroom Deputy, their own witnesses and opposing counsel no later than 9:00 am PT on Friday, July 31, 2020. While parties may not wish to reveal the identity of all potential witnesses in advance, it should be obvious that certain individuals, such as persons named in the complaint may be witnesses. Therefore, the parties are requested to provide any exhibits they plan to use with such witnesses to opposing counsel in advance-with the exception of Jencks materials.

In lieu of email, a party can provide exhibits to the Judge, Courtroom Deputy, other parties by uploading them to the NLRB's SharePoint page for this case. The parties have been emailed a link to this page. If a party cannot locate the email, they should check their Spam and other folders or contact Mr. Eskenazi. It is requested that a party that may potentially introduce an audio or video exhibit, or another very large file, inform the Judge, Courtroom Deputy, and opposing counsel no later than 9:00 am PT on Friday, July 31, 2020. Such files may not be transmittable over email and may need to be uploaded to the SharePoint page.

All exhibits should, if at all possible, be pre-marked, paginated and converted into one bookmarked PDF file per party.

All confidential personal identifying information such as Social Security Numbers, Birth Dates, etc. should be redacted from the exhibits.

Calling witnesses and forwarding the electronic meeting invitation ("e-vite")

Counsel must forward the e-vite to their witnesses or provide the ALJ with the witnesses' email addresses so that the Judge or Courtroom Deputy can send an e-vite to them. When counsel forwards the e-vite, counsel should take care not to also forward the email address of the Judge or the Courtroom Deputy.

Counsel must also ensure that their witnesses have the necessary equipment and internet connection to join and testify at the Zoom hearing.

Witnesses may not use a virtual background. Opposing counsel must be able to see who, if anyone, is in the room with them when they testify.

The Judge or Courtroom Deputy will send a witness an e-vite to the Zoom hearing if counsel did not already forward an e-vite.

The Judge or Courtroom Deputy will admit witnesses into the hearing from the waiting room.

Conferring via the Zoom breakout room function

If counsel want to consult each other or speak with clients (other than when the client is on the witness stand), they may ask to be placed in a private breakout room.

The Judge or his co-host will close the breakout room and return those in it to the main hearing when requested or, with adequate notice, when it is appropriate to do so. Conversations inside the breakout room cannot be heard by persons outside of it.

Jencks Statements

Jencks statements such as affidavits given to the General Counsel will be provided to opposing counsel via email or the Zoom chatroom function, after a witness has testified on direct examination. After cross-examination opposing counsel **MUST** delete all Jencks statements from their computer and represent to the court and the General Counsel that it has done so.

Showing documents to witnesses during examination

Counsel may use the "Share Screen" tool to share a document on the screen or use the Zoom group chat function to send a document as an attachment to a witness, other counsel, the Judge, and the reporter. However, computer email or SharePoint may be a better option in that each participant can follow along at his or her own pace.

If shared, counsel may scroll down the document page by page or go to a particular page; or counsel could give control over the document to another participant on request, who may scroll through it.

If sent as an attachment via email, SharePoint, or group chat, everyone may download and view the document on their own. Ensure exhibits are properly marked, paginated, and bookmarked before the hearing or before being offered into the record as an exhibit.

The Judge may ask, upon the request of a party, witnesses to move the camera to show their surroundings.

Offering exhibits into the record

Counsel may email or use SharePoint or the Zoom group chat function to send an exhibit to other counsel, the Judge, and the reporter if they have not already done so; they can then download it to their computer as an admitted exhibit. Email and SharePoint are the recommended methods for sharing exhibits.

Counsel are encouraged to share this Order/Guideline with the party it represents, witnesses and persons who request to observe the hearing through counsel or the party it represents.

So Ordered.

Dated at San Francisco, California, this 20th day of July 2020.

Ariel L. Sotolongo
Administrative Law Judge.

Served by email upon the following:

For the NLRB Region 19:
Adam D. Morrison, Esq.
Email: adam.morrison@nlrb.gov
Sarah McBride, Esq.,
Email:sarah.mcbride@nlrb.gov

For the Charging Party:
Matthew Harris, Staff Attorney,
Email: mharris@teamster.org (IBT)

For the Respondent:
Rick Grimaldi, Esq.,
Email: rgrimaldi@fisherphillips.com
Samantha S. Bononno, Esq.,
Email: sbononno@fisherphillips.com
Kelsey E. Beerer, Esq..
Email: kbeerer@fisherphillips.com
(Fisher Phillips, LLP)

Exhibit L

FORM NLRB-31

SUBPOENA DUCES TECUM

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

To Jared Foster

6219 Wrigley Drive, Pasco, WA 99301

As requested by Samantha Sherwood Bononno, Esq. as counsel for Oxarc, Inc.

whose address is Two Logan Square, 12th Floor, 100 N. 18th St., Philadelphia, PA 19103
(Street) (City) (State) (ZIP)

YOU ARE HEREBY REQUIRED AND DIRECTED TO APPEAR BEFORE An Administrative Law Judge

of the National Labor Relations Board

at

in the City of via Zoom video conference, the details of which will be provided,

on Monday, August 3, 2020, beginning at 9:00 a.m. or any adjourned

or rescheduled date to testify in Oxarc, Inc.
Cases 19-CA-230472, et al.
(Case Name and Number)

And you are hereby required to bring with you and produce at said time and place the following books, records, correspondence, and documents via email in light of the Zoom nature of the hearing to sbononno@fisherphillips.com.

SEE ATTACHMENT

If you do not intend to comply with the subpoena, within 5 days (excluding intermediate Saturdays, Sundays, and holidays) after the date the subpoena is received, you must petition in writing to revoke the subpoena. Unless filed through the Board's E-Filing system, the petition to revoke must be received on or before the official closing time of the receiving office on the last day for filing. If filed through the Board's E-Filing system, it may be filed up to 11:59 pm in the local time zone of the receiving office on the last day for filing. Prior to a hearing, the petition to revoke should be filed with the Regional Director; during a hearing, it should be filed with the Hearing Officer or Administrative Law Judge conducting the hearing. See Board's Rules and Regulations, 29 C.F.R Section 102.31(b) (unfair labor practice proceedings) and/or 29 C.F.R. Section 102.66(c) (representation proceedings) and 29 C.F.R Section 102.111(a)(1) and 102.111(b)(3) (time computation). Failure to follow these rules may result in the loss of any ability to raise objections to the subpoena in court.

B-1-19NVZAR

Under the seal of the National Labor Relations Board, and by direction of the Board, this Subpoena is

Issued at Pasco, Washington

Dated: July 15, 2020

John Ring, Chairman

NOTICE TO WITNESS. Witness fees for attendance, subsistence, and mileage under this subpoena are payable by the party at whose request the witness is subpoenaed. A witness appearing at the request of the General Counsel of the National Labor Relations Board shall submit this subpoena with the voucher when claiming reimbursement.

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Case 19-CA-230472

B-1-19NVZAR

RETURN OF SERVICE

I certify that, being a person over 18 years of age, I duly served a copy of this subpoena

(Check method used.)

- ☐ by person
- ☑ by certified mail
- ☐ by registered mail
- ☐ by telegraph
- ☐ by leaving copy at principal office or place of business at

_____

_____

_____

on the named person on

July 15, 2020

(Month, day, and year)

Danielle Innocenzo

(Name of person making service)

Legal Assistant

(Official title, if any)

CERTIFICATION OF SERVICE

I certify that named person was in attendance as a witness at

_____

on

(Month, day or days, and year)

_____

(Name of person certifying)

_____

(Official title)

ATTACHMENT TO SUBPOENA DUCES TECUM

Re: 19-CA-230472, et al.

DEFINITIONS AND INSTRUCTIONS

1) The word "Document" or "Documents" means, without limitation, the following items, whether printed or recorded or reproduced by any other mechanical or electronic process, or written or produced by hand, or any existing printed, typewritten, handwritten or otherwise recorded material of whatever kind and/or character, including, but not limited to: agreements, communications, correspondence, telegrams, letters, memoranda, facsimile transmissions, minutes, notes of any character, diaries, calendars, statements, affidavits, photographs, microfilm or microfiche, audio and/or video tapes, statistics, pamphlets, newsletters, press releases, bulletins, transcripts, summaries or records of telephone conversations, summaries or records of personal conversations or interviews, conferences, transcripts or summaries or reports of investigations and/or negotiations, drafts, internal or inter-office memoranda or correspondence, lists, data contained in computers, computer printouts, computer discs and/or files and all data contained therein, e-mail, any marginal or "post-it" or "sticky pad" comments appearing on or with documents, and all other writings, figures or symbols of any kind, including but not limited to carbon, photographic or other duplicative copies of any such material in the possession of, control of or available to the subpoenaed party, or any agent, representative, or other persons acting in cooperation with, in concert with, or on behalf of said subpoenaed party.

2) "Communications" means any correspondence, conversation, dialogue, discussion, interview, consultation, agreement, understanding between or among two or more persons, notice, transfer or exchange of information, expression of intent, inquiry or other direction, conveyance or receipt of facts or messages, by oral, written, face-to-face, electronic, telephonic means, or any other medium, including, but not limited to, emails and text messages.

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4) "Respondent" means OXARC, INC., including any representatives with authority to act on its behalf.

5) "Union" means INTERNATIONAL BROTHERHOOD OF TEAMSTERS and any local charter, including any representatives with authority to act on their behalf.

6) "You," "your," and "FOSTER" means JARED FOSTER, including any representatives with authority to act on his behalf.

7) Unless otherwise defined herein, the term "Complaint" refers to the Third Consolidated Complaint and Notice of Hearing issued by the Regional Director for Region 19 on December 9, 2019, in connection with the above-referenced matter.

8) As to any documents not produced in compliance with this subpoena on any ground or if any document requested was, through inadvertence or otherwise destroyed or is no longer in your possession, please state:

a. the author;
b. the recipient;
c. the name of each person to whom the original or a copy was sent;
d. the date of the document;
e. the subject matter of the document; and
f. the circumstances under which the document was destroyed, withheld or is no longer in your possession.

9) This request is continuing in character and if additional responsive documents come to your attention following the date of production, such documents must be promptly produced.

10) This request seeks production of all documents described, including all drafts and non-identical or distribution copies and contemplates production of responsive documents in their entirety, without abbreviation, redaction, deletion or expurgation.

11) All documents produced pursuant to this subpoena are to be organized by what subpoena paragraph each document or documents are responsive, and labels referring to that subpoena paragraph are to be affixed to each document or set of documents.

12) Through this subpoena, Respondent is not seeking the production of any affidavit prepared by the NLRB in the course of its investigation of this matter. To the extent you object to the production of documents and/or recordings requested by this subpoena on the grounds that compliance with the subpoena would require the release or disclosure of documents and/or recordings that disclose the identities of employees or identify other alleged confidential or protected information, you are requested to produce all responsive documents and/or recordings for an in-camera inspection by the Administrative Law Judge for determination of whether claims involving the disclosure of employee identities or confidential or protected information are valid, or whether such information can be redacted so that the applicable documents and/or recordings can be produced to Respondent.

DOCUMENTS SUBJECT TO SUBPOENA

1. Any and all Documents and/or Communications that reflect, relate to, or refer to any discipline or corrective action you received by Respondent during your employment with Respondent.

2. Any and all Documents and/or Communications that reflect, relate to, or refer to the termination of your employment with Respondent.

3. Any and all Documents and/or Communications that reflect, relate to, or refer to any discipline you received while employed by Respondent, including verbal warnings, written warnings or any discussions of performance or work rule violations.

4. Any and all Documents and/or Communications that reflect, relate to, or refer to any and all employment and/or offers of employment secured by you from June 14, 2018 to present.

5. Your tax returns, both state and federal, for the tax and/or calendar years 2018 through the present.

6. Any and all Documents that reflect, relate to, or refer to income you have received from June 14, 2018 to the present, including, but not limited to, any sums received from unemployment compensation, disability benefits, social security, workers' compensation, or other source(s).

7. Any and all Documents and/or Communications that reflect, relate to, or refer to any alleged union and/or protected concerted activities that you engaged in during your employment with Respondent.

8. Any and all Documents that relate to any Communications, oral or written, taken or received by you, of a potential witness or person with knowledge of facts pertinent to this Complaint.

9. Any and all Documents and/or Communications that reflect, relate to, or refer to the Respondent's alleged violation(s) of the National Labor Relations Act with respect to you.

10. Any and all Communications between you and the Union concerning the allegations contained in the Complaint.

11. Any and all e-mails or text messages that reflect, relate to, or refer to your claims at issue in this Complaint.

12. Any and all Documents which support, rebut, or otherwise concern the allegations contained in the Complaint.

Exhibit M

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

OXARC, INC.	
and	Cases 19-CA-230472
TEAMSTERS LOCAL 839	
and	19-CA-237336 19-CA-237499 19-CA-238503
TEAMSTERS LOCAL 690	
and	19-CA-248391
INTERNATIONAL BROTHERHOOD OF TEAMSTERS	
and	19-CA-232728
JARED FOSTER, an Individual	

COUNSEL FOR THE GENERAL COUNSEL'S PETITION TO REVOKE THE SUBPOENA DUCES TECUM ISSUED TO CHARGING PARTY JARED FOSTER

Pursuant to Rule 102.31(b) of the Board's Rules and Regulations and Statements of Procedure (the "Board's Rules and Regulations"), Counsel for the General Counsel respectfully requests that Oxarc, Inc.'s ("Respondent") subpoena *duces tecum* B-1-19NVZAR (the "Subpoena"), issued to individual Charging Party Jared Foster ("Foster"), attached hereto as Exhibit A, be revoked in its entirety. Aside from the Subpoena being another naked attempt by Respondent to obtain impermissible pretrial discovery, it also seeks documents that are neither relevant to these proceedings nor that Respondent is

legally entitled to. In fact, as discussed below, Respondent reaches so far beyond what it is legally entitled to in seeking the § 7 activities and communications between Foster and his coworkers and his union that Respondent may actually be committing additional violations of the National Labor Relations Act (the "Act"), 29 U.S.C. 151 *et seq*.

A. Items #1-3 of the Subpoena Seek Respondent's Own Documents from Foster

In Items #1-3 of the Subpoena, Respondent seeks any discipline issued *by Respondent* to Foster, including his termination. To be clear, these are Respondent's *own* documents that Respondent created and then issued to Foster, and that Respondent is now requesting *from* Foster. This is ludicrous – they are documents under Respondent's control.

While it is unknown if Foster still even possess these documents or what Respondent's motivations are for requesting this information, clearly Respondent, not Foster, is in the best position to collect and obtain its own documents. Accordingly, Foster should not be compelled to provide copies of Respondent's own documents back to them. Nor should Foster bear the risk of a possible adverse inference being drawn for a lack of compliance with the Subpoena given Respondent is in control of the documents sought. *See CPS Chem. Co*., 324 NLRB 1018, 1019 (1997), *enf'd*. 160 F.3d 150 (3d Cir. 1998) (absence of documents did not prevent the Respondent from proving any relevant part of its case).

Even if this request were not so ill-founded, it is inexplicable given that Respondent admitted in its Answer to the Consolidated Complaint that it disciplined and discharged Foster on June 14, 2018. Thus, at least a portion of these Items seek documents for an issue that is not even in dispute in this matter. As the Act and Board case law clearly

hold, information sought through a subpoena under § 11(1) of the Act must be reasonably relevant to a matter in dispute in the proceedings. *See* 29 U.S.C. § 161(1) (petitions to revoke should be granted when information to be produced "does not relate to any matter . . . in question in [the] proceedings"); *CNN America, Inc*., 353 NLRB 891 (2009) (subpoenaed items must be reasonably relevant to the disputed matters under litigation); *Perdue Farms, Inc. v. NLRB,* 144 F.3d 830, 834 (D.C. Cir. 1998). Accordingly, Items # 1–3 of the Subpoena should be quashed.

B. Items #4-6 Are Not Relevant to the Merit Phase of This Proceeding

Respondent's requests in Items #4-6 seek various post-discharge financial and employment information from Foster related to Foster's potential backpay, including his mitigation efforts. It does not, however, seek any information concerning whether Respondent violated the Act as alleged in the Complaint, which is the only issue in this proceeding at this time. This is not a compliance proceeding after which Respondent has been found to be in violation of the Act as alleged.

The Board traditionally bifurcates complaint and compliance process.[1] *See, e.g., Great Lakes Chem. Corp*., 323 NLRB 749 (1997). The first stage, often called the "liability" or "merit" phase, only contains litigation on whether a respondent violated the Act as alleged in the complaint. *See* § 102.15 of the Board's Rules and Regulations (the initial complaint shall only include jurisdictional facts and "a concise description of the acts which are claimed to constitute unfair labor practices"). If the Board finds a violation, then

[1] The rare exception is, of course, when the Regional Director, pursuant to his authority in § 102.54(b) of the Board's Rules and Regulations, issues a combined complaint and compliance speculation, which has not been done in the instant matter.

the matter enters a second compliance stage. *See* § 102.54 of the Board's Rules and Regulations. There is no compliance specification as part of the instant complaint.

The information sought by Respondent in Items #4-6 of the Subpoena only relates to the potential compliance stage and does not relate, in any way, to the matters being litigated at this stage of the proceedings. As such, Items #4-6 of Respondent's Subpoena are clearly not relevant to a matter in dispute here and should be revoked. *See King Soopers, Inc*., 364 NLRB No. 93, slip op. at 8, 22 (2016) (granting the General Counsel's petition to revoke the respondent employer's subpoena duces tecum to the individual charging party seeking documentation of her search for work efforts and expenses, as the subpoenaed information was irrelevant at the merits stage of the proceeding), *vacated in part on other grounds* 859 F.3d 23 (D.C. Cir. 2017).

C. Items #7 and #10 Are Inappropriate and Likely Violate § 8(a)(1) of the Act

Item #7 seeks "all documents and communications . . . of [Foster's] alleged union and/or protected concerted activities." Likewise, Item #10 seeks "all documents and communications between Foster and his Union" concerning his allegation that Respondent discharged him. Respondent unsuccessfully sought this information from the General Counsel through its failed Motion for a Bill of Particulars ("Motion"), attempting to compel the General Counsel to identify and disclose the specific § 7 activity engaged in by Foster, prior to testimony in the upcoming hearing. In his July 13, 2020 Order denying the Motion, the Administrative Law Judge correctly ruled that the Complaint, as alleged, clearly complies with the Board's Rules and Regulations and that the disclosure of an alleged discriminatee's § 7 activities, prior the presentation of such evidence at the hearing, is not permitted. *See NLRB v. Robbins Tire & Rubber Co*., 437

U.S. 214 (1978) (upholding the Board's longstanding prohibition against pre-disclosure of employees' § 7 activities, prior to the testimony at hearing, because of the very real dangers posed by interference by a respondent, as in the instant case, who has been charged with violating employees' § 7 rights). Respondent, through its Subpoena, is now attempting to make an end run around that ruling by seeking the same information from an unrepresented individual charging party and alleged discriminatee. Not only is this reprehensible, but it is a wholly inappropriate and unlawful use of the subpoena process.

Respondent's subpoena has a primary and unlawful objective by attempting to compel Foster's and other employees' protected, concerted activities through Subpoena Item #7, and Foster's protected communications with the Union through Subpoena Item #10. "The Board zealously seeks to protect the confidentiality interests of employees because of the possibility of intimidation by employers who obtain the identity of employees engaged in organizing." *Wright Elec., Inc.*, 327 NLRB 1194, 1195 (1999), *enf'd.* 200 F.3d 1162 (8th Cir. 2000). Indeed, the Board takes this protection so seriously that an employer who seeks to compel an individual through subpoena to identity his and other employees' § 7 activities independently violates § 8(a)(1) of the Act. *See, e.g., Chino Valley Med. Ctr.*, 362 NLRB 283, 283, n.1 (2015) (8(a)(1) violation in issuing subpoenas duces tecum to employees attempting to compel them to disclose § 7 activities and communications), *enfd. sub nom*. *United Nurses Ass'n of Cal. v. NLRB***,** 871 F.3d 767 (9th Cir. 2017); *Guess?, Inc*., 339 NLRB 432 (2003) (8(a)(1) violated during deposition in a workers' compensation case by asking employee to reveal the identities of those who attended union meetings); *Wright Elec., Inc*., 327 NLRB at 1194 (8(a)(1) by

subpoenaing employee authorization cards in a state court lawsuit), *enf'd*. 200 F.3d. 1162, 1167 (8th Cir. 2000); *National Tel. Directory Corp.*, 319 NLRB 420, 421 (1995).

Moreover, any compelled response to Item #7 in the Subpoena would necessarily also include Foster's affidavit provided to the Board during the investigation of his charge. This is not permissible and would constitute a further violation of § 8(a)(1) of the Act. *See, e.g., Santa Barbara News-Press*, 361 NLRB 903, 903, n.1 (2014). Even if it didn't, under § 102.118(b)(1) of the Board's Rules and Regulations, the production of witness statements is *only* allowed *after the witnesses have testified* in a Board proceeding about subjects covered by such statements and a timely request for such statements is made for the purpose of cross-examination. *H.B. Zachry Co.*, 310 NLRB 1037, 1038 (1993).

Since it is well settled that a subpoena that has an unlawful objective (*i.e*., seeking to compel disclosure of an employees' § 7 activities or communications, as discussed above), is itself unlawful, the Subpoena must be quashed. *See Santa Barbara News-Press,* 358 NLRB 1539, 1539-40 (2012), *reaffirmed* 362 NLRB 252 (2015) (after *de novo* review in light of *NLRB v. Noel Canning*, 572 U.S. 513 (2014), Board reaffirmed prior decision); *Dilling Mech. Contractors, Inc.,* 357 NLRB 544, 546 (2011).

D. Items #8-9 and #11-12 Are Impermissible Attempts at Pre-Trial Discovery and Are Privileged by the Work Product and/or Attorney-Client Privileges

By these Items in the Subpoena, Respondent is once again requesting the General Counsel's evidence in support of the Complaint, this time by requesting it from Foster. Item #8 of the Subpoena seeks documents and communications with any "potential

witness or person with knowledge of facts pertinent to this Complaint."[2] Similarly, Item #9 seeks documents and communications concerning Respondent's "alleged violation(s) of the [Act] with respect to" Foster. Likewise, Item #11 seeks "all e-mails and text messages that reflect, relate to, or refer to [Foster's] claims at issue in the Complaint." And, in Item #12, Respondent seeks "documents, which support, rebut, or otherwise concern the allegations in the Complaint."

These four Subpoena Items, in sum, essentially seek from Foster all of the evidence in support of the Complaint allegations in advance of trial, including those documents prepared and submitted as part of the Board's investigatory process of his charge. This is, plainly and simply, impermissible pre-trial discovery. *See, e.g., Offshore Mariners United*, 338 NLRB 745, 746 (2002) (it is well established that the Board, with court approval, does not allow for pretrial discovery); *David R. Webb Co*., 311 NLRB 1135 (1993) (due to the unique nature of its jurisdiction, the Board does not permit pretrial discovery because of the very possibility of retaliation and further discrimination by a responded accused of violating employees' § 7 rights); *Mid-Atlantic Rest. Grp. LLC v. NLRB*, 722 Fed. Appx. 284, 287, n. 2 (3rd Cir. Jan. 25, 2018).

Not only are items #8-9 and #11-12 impermissible attempts at pretrial discovery, but many, if not all, of the documents that would potentially be responsive to these Subpoena Items are also protected as work-product privilege. To the extent such documents reflect the written work product, thought processes, and conversations of Board agents, they are protected from disclosure. *See Hickman v. Taylor*, 329 U.S. 495

[2] In addition to arguments made in this section, Respondent also potentially violates § 8(a)(1) of the Act with Item #8 because, as discussed above, it compels production of communications between Foster and other individuals that constitutes § 7-protected activity. *See Chino Valley Med. Ctr.*, 362 NLRB at 283.

(1947); Fed. R. Civ. P. 26(b)(3). In *Hickman*, the United States Supreme Court explained that the work-product protection encompasses "interviews, statements, memoranda, correspondence, briefs, mental impressions, [and] personal beliefs." 329 U.S. at 511. Moreover, the protection afforded work product under Fed. R. Civ. P. 26(b)(3) extends to material prepared by agents of the attorney as well as those prepared by the attorney himself, and continues beyond the litigation for which the documents at issue were prepared. *See U.S. v. Nobles*, 422 U.S. 225, 238-39 (1975); *FTC v. Grolier*, 462 U.S. 19 (1983). Therefore, the subpoenaed work product of the Board, even if requested through an individual charging party, is shielded from compelled production through F.R.C.P. 26(b)(3)'s directive that "the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney."

The Board also extends such protection from disclosure of other types of documents prepared and submitted as part of the Board's investigatory process. In *Kaiser Aluminum,* 339 NLRB 829 (2003), for example, the Board sustained the revocation of a subpoena calling for the production of a charging party's position statements because the position statements constituted "work product" within the meaning of Rule 26(b)(3) of the Federal Rules of Civil Procedure. Other correspondence with Board agents and other documentation or communications with the Board would likewise be privileged from disclosure as "work product" insofar as such documents necessarily would have been prepared by the Union or by Board agents during the investigation of the unfair labor practice charge and in anticipation of litigation and would reveal the mental impressions, conclusions, opinions, or legal theories of the Union and the General Counsel. Fed. R.

of Civ. P. 26(b)(3); *Hickman v. Taylor*, 329 U.S. at 495; *Central Tel. Co.*, 343 NLRB 987 (2004). Accordingly, Subpoena Items #8-9 and #11-12 should be quashed.

E. Conclusion

For the reasons set forth above and based upon well settled Board law, Counsel for the General Counsel respectfully requests that the Subpoena issued to individual Charging Party Jared Foster, in its entirety, be quashed.

Respectfully submitted this 21st day of July, 2020.

/s/ Sarah M. McBride
/s/ Adam D. Morrison
Sarah M. McBride and Adam D. Morrison
Counsel for General Counsel
National Labor Relations Board, Region 19
Jackson Federal Building
915 Second Avenue, 29th Floor
Seattle, WA 98174
Sarah.mcbride@nlrb.gov
Adam.morrison@nlrb.gov
(206) 220-6300 (phone)
(206) 220-6305 (fax)

FORM NLRB-31

SUBPOENA DUCES TECUM

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

To Jared Foster

6219 Wrigley Drive, Pasco, WA 99301

As requested by Samantha Sherwood Bononno, Esq. as counsel for Oxarc, Inc.

whose address is Two Logan Square, 12th Floor, 100 N. 18th St., Philadelphia, PA 19103
(Street) (City) (State) (ZIP)

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Exhibit A

Case 19-CA-230472

B-1-19NVZAR

RETURN OF SERVICE

I certify that, being a person over 18 years of age, I duly served a copy of this subpoena

(Check method used.)

- ☐ by person
- ☑ by certified mail
- ☐ by registered mail
- ☐ by telegraph
- ☐ by leaving copy at principal office or place of business at

_____

_____

_____

on the named person on

July 15, 2020

(Month, day, and year)

Danielle Innocenzo

(Name of person making service)

Legal Assistant

(Official title, if any)

CERTIFICATION OF SERVICE

I certify that named person was in attendance as a witness at

_____

on

(Month, day or days, and year)

_____

(Name of person certifying)

_____

(Official title)

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b. the recipient;
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f. the circumstances under which the document was destroyed, withheld or is no longer in your possession.

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10) This request seeks production of all documents described, including all drafts and non-identical or distribution copies and contemplates production of responsive documents in their entirety, without abbreviation, redaction, deletion or expurgation.

11) All documents produced pursuant to this subpoena are to be organized by what subpoena paragraph each document or documents are responsive, and labels referring to that subpoena paragraph are to be affixed to each document or set of documents.

12) Through this subpoena, Respondent is not seeking the production of any affidavit prepared by the NLRB in the course of its investigation of this matter. To the extent you object to the production of documents and/or recordings requested by this subpoena on the grounds that compliance with the subpoena would require the release or disclosure of documents and/or recordings that disclose the identities of employees or identify other alleged confidential or protected information, you are requested to produce all responsive documents and/or recordings for an in-camera inspection by the Administrative Law Judge for determination of whether claims involving the disclosure of employee identities or confidential or protected information are valid, or whether such information can be redacted so that the applicable documents and/or recordings can be produced to Respondent.

DOCUMENTS SUBJECT TO SUBPOENA

1. Any and all Documents and/or Communications that reflect, relate to, or refer to any discipline or corrective action you received by Respondent during your employment with Respondent.

2. Any and all Documents and/or Communications that reflect, relate to, or refer to the termination of your employment with Respondent.

3. Any and all Documents and/or Communications that reflect, relate to, or refer to any discipline you received while employed by Respondent, including verbal warnings, written warnings or any discussions of performance or work rule violations.

4. Any and all Documents and/or Communications that reflect, relate to, or refer to any and all employment and/or offers of employment secured by you from June 14, 2018 to present.

5. Your tax returns, both state and federal, for the tax and/or calendar years 2018 through the present.

6. Any and all Documents that reflect, relate to, or refer to income you have received from June 14, 2018 to the present, including, but not limited to, any sums received from unemployment compensation, disability benefits, social security, workers' compensation, or other source(s).

7. Any and all Documents and/or Communications that reflect, relate to, or refer to any alleged union and/or protected concerted activities that you engaged in during your employment with Respondent.

8. Any and all Documents that relate to any Communications, oral or written, taken or received by you, of a potential witness or person with knowledge of facts pertinent to this Complaint.

9. Any and all Documents and/or Communications that reflect, relate to, or refer to the Respondent's alleged violation(s) of the National Labor Relations Act with respect to you.

10. Any and all Communications between you and the Union concerning the allegations contained in the Complaint.

11. Any and all e-mails or text messages that reflect, relate to, or refer to your claims at issue in this Complaint.

12. Any and all Documents which support, rebut, or otherwise concern the allegations contained in the Complaint.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Counsel for the General Counsel's Petition to Revoke the Subpoena Duces Tecum Issued to Charging Party Jared Foster was served on the 21st day of July, 2020, on the following parties:

E-File:

The Honorable Gerald Etchingham
Associate Chief Judge
National Labor Relations Board
Division of Judges
901 Market St., Ste. 300
San Francisco, CA 94103

E-Mail:

Rick Grimaldi, Esq.
Samantha S. Bononno, Esq.
Fisher Phillips, LLP
Email: rgrimaldi@fisherphillips.com
Email: sbononno@fisherphillips.com

Matthew Harris, Staff Attorney
International Brotherhood of Teamsters
Email: mharris@teamster.org

Kristy Kennedy

Kristy Kennedy, Office Manager

Exhibit N

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

OXARC, INC.

and **Cases 19-CA-230472**

TEAMSTERS LOCAL 839

and **Cases 19-CA-237336**
19-CA-237499
19-CA-238503

TEAMSTERS LOCAL 690

and **Case 19-CA-248391**

INTERNATIONAL BROTHERHOOD OF TEAMSTERS

and **Case 19-CA-232728**

JARED FOSTER, AN INDIVIDUAL

ORDER TO SHOW CAUSE REGARDING COUNSEL FOR THE GENERAL COUNSEL'S PETITION TO REVOKE SUBPOENA

On July 21, 2020, counsel for the General Counsel filed a Petition to Revoke subpoena duces tecum B-1-19NVZAR in the above matter. The hearing is set to commence on August 3, 2020, at 9 a.m. by Zoom videoconference.

Counsel for the Respondent is hereby given until no later than close of business on Friday, July 24, 2020 to show why counsel for the General Counsel's Petition to Revoke subpoena should not be granted.

SO ORDERED.

Dated at San Francisco, California, this 21st day of July 2020.

Ariel L. Sotolongo
Administrative Law Judge.

Served by email upon the following:

For the NLRB Region 19:
Adam D. Morrison, Esq.
Email: adam.morrison@nlrb.gov
Sarah McBride, Esq.,
Email:sarah.mcbride@nlrb.gov

For the Charging Party:
Matthew Harris, Staff Attorney,
Email: mharris@teamster.org
(IBT)

For the Respondent:
Rick Grimaldi, Esq.,
Email: rgrimaldi@fisherphillips.com
Samantha S. Bononno, Esq.,
Email: sbononno@fisherphillips.com
Kelsey E. Beerer, Esq.,
Email: kbeerer@fisherphillips.com
(Fisher Phillips, LLP)

Exhibit O

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

OXARC, INC.	:	
	:	
and	:	CASES 19-CA-230472; 19-CA-237336;
	:	19-CA-237499; 19-CA-238503;
	:	19-CA-232728; 19-CA-248391
TEAMSTERS LOCAL 839	:	
	:	
and	:	
TEAMSTERS LOCAL 690	:	
	:	
and	:	
	:	
INTERNATIONAL BROTHERHOOD OF TEAMSTERS	:	
	:	
and	:	
	:	
JARED FOSTER, an individual.	:	

RESPONSE TO JULY 21, 2020 ORDER TO SHOW CAUSE OF RESPONDENT IN OPPOSITION TO COUNSEL FOR THE GENERAL COUNSEL'S PETITION TO REVOKE SUBPOENA DUCES TECUM NO. B-1-19NVZAR

Respondent Oxarc, Inc. ("Respondent" or "Oxarc"), by and through its undersigned counsel, hereby files this Response to the July 21, 2020 Order to Show Cause of Respondent Oxarc, Inc. in Opposition to Counsel for the General Counsel's Petition to Revoke Subpoena Duces Tecum No. B-1-19NVZAR.

I. Background

On July 15, 2020, Respondent served a named party, Jared Foster (hereinafter "Foster"), with Subpoena Duces Tecum No. B-1-19NVZAR (hereinafter "Subpoena"). In an Attachment to the Subpoena, Respondent requested twelve (12) enumerated categories of documents from Foster. In stark contrast to Counsel for the General Counsel's contentions, and as will be demonstrated below, Respondent's requests are both relevant and appropriate.

II. Applicable Legal Standards

Section 102.31(b) of the Board's Rules and Regulations states that a subpoena will be revoked if the evidence requested "does not relate to any matter under investigation or in question in the proceedings," the subpoena "does not describe with sufficient particularity the evidence whose production is required," or "if for any other reason sufficient in law the subpoena is otherwise invalid." 29 CFR § 102.31(b). In determining whether "any other reason sufficient in law" exists to revoke a subpoena, the Board has looked to the Federal Rules of Civil Procedure as "useful guidance." *Brink's Inc.*, 281 NLRB 468 (1986).

In ruling on a petition to revoke, the judge may evaluate the subpoena in light of any modifications or limitations that the subpoenaing party offers or agrees to in its opposition to the petition. *See, e.g., Bannum Place of Saginaw*, 7-CA-211090, 2018 WL 6628927, at *1 n. 2 (unpub. Board order issued Dec. 17, 2018); and *FCA US LLC*, 8-CA-185825, 2017 WL 5000838, at *1 n. 3 (unpub. Board order issued Oct. 31, 2007); *see also CNN America, Inc.*, 353 NLRB 891 (2009) (rejecting employer's argument that the General Counsel's subpoena "must stand or fall as a whole"), *final decision and order issued* 361 NLRB 439 (2014), *recons. denied* 362 NLRB No. 38 (2015), *rev. granted in part and denied in part* 865 F.3d 740 (D.C. Cir. 2017).

III. Arguments in Opposition to Counsel for the General Counsel's Petition to Revoke

A. Document Request Numbers 1 Through 3 of the Subpoena Are Relevant

Document Requests numbers 1 through 3 of the Subpoena request documents relating to Foster's discipline and termination. Counsel for the General Counsel maintains these document requests should be quashed for the following reasons: (1) the documents requested are under Respondent's control; and (2) the documents are irrelevant given that Respondent has admitted in

its Answer to the Third Consolidated Complaint that it disciplined and eventually terminated Foster's employment. Both arguments are unavailing.

First, the mere fact that Respondent possesses certain documents relevant to Foster's history of discipline and termination does not mean that Respondent possesses ***all*** such documents. *Bakery Workers*, 21-CA-171340, 2016 WL 4141212 (unpub. Board order issued Aug. 3, 2016) ("[T]he possibility that the requested information may be available from other sources is not a basis to quash a subpoena, as the requested documents may be necessary to corroborate or supplement the investigative file."). Foster may have documents relating to his discipline and termination that were not provided to Respondent during the course of Foster's employment. By way of example, Foster could have maintained a journal with excerpts specific to his discipline and/or termination. In addition, Foster could be in possession of communications such as text messages that speak to his discipline and/or termination of employment from Respondent.

Second, Foster does not bear the risk of an adverse inference if he truthfully and completely responds to the Subpoena, which, may include a response that he is not in possession of such documents. Succinctly stated, the adverse inference rule consists of the principle that "when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him." *Auto Workers v. NLRB*, 459 F.2d 1329, 1335-1336 (D.C. Cir. 1972) (describing the adverse inference rule as "more a product of common sense than of the common law"); *see also Metro-West Ambulance Service, Inc.*, 360 NLRB No. 124 at pp. 2-3 and at fn. 13 (2014); *SKC Electric*, 350 NLRB 857, 872 (2007). There is a difference between a deliberate failure to produce documents in one's possession and an acknowledgment that one is not in possession of such documents and/or no such documents exist. *Compare Shamrock Foods Co. v. NLRB*, 779 F. App'x 752, 754-55 (D.C. Cir. 2019) ("The Board is entitled

to impose a variety of sanctions to deal with subpoena noncompliance, including permitting the party seeking production to use secondary evidence, precluding the noncomplying party from rebutting that evidence or cross-examining witnesses about it, and drawing adverse inferences against the noncomplying party."). There can be no fear of an adverse inference if Foster responds to the document requests based on the documents in his possession.

Moreover, the asserted nonexistence of requested records is not grounds for revoking a subpoena. *See Ironworkers Local 433*, 21-CB-129959, 2015 WL 471558 (unpub. Board order issued Feb. 4, 2015) ("If no evidence responsive to any portion of the subpoena exists, the custodian of records must provide sworn testimony to that effect, including a description of the [party's] efforts to identify and locate such evidence.").

Third, Respondent's admission to disciplining Foster and terminating his employment does not render Document Request numbers 1 through 3 irrelevant. According to Counsel for the General Counsel, it remains disputed as to whether Foster's discipline and termination were causally related to his alleged engagement in union protected activities. As discussed above, Foster may be in possession of self-created documents, or communications with non-Respondent third-parties that are relevant for purposes of bolstering Respondent's position that it legitimately disciplined Foster and terminated his employment and, further, that the decision had no bearing on Foster's alleged engagement in protected union activities.

For these reasons, Document Request numbers 1 through 3 should not be revoked.

B. Document Request Numbers 4 Through 6 of the Subpoena are Hereby Preserved for a Compliance Proceeding, if Applicable

Document Request numbers 4 through 6 relate to Foster's post-employment financial state and mitigation efforts. Counsel for the General Counsel petitions to revoke these requests because

they are not relevant to the merit phase of this proceeding. As detailed below, these requests are relevant.

If the ALJ finds Respondent violated the Act with respect to Foster, the ALJ will necessarily impose a remedy. Having information related to Foster's current employment is not necessary for this purpose and therefore not premature. *See, e.g.*, *Hennes & Mauritz, LP d/b/a H&M and United for Respect*, Cases 32-CA-250461, 2020 WL 3440105 (June 22, 2020 (Sotolongo, J.) (finding that the employer unlawfully discharged its employee and ordering remedy of reinstatement and make-whole remedy). On the contrary, the ALJ must determine whether reinstatement, for example, is a proper remedy. *See id.* Foster's post-employment financial records and mitigation efforts are required to determine whether there can even be a make-whole remedy. If Foster has secured immediate employment, and if he makes the same or more than he was making at Oxarc, this will necessarily impact that analysis.

As to Counsel for the General Counsel's contention that such documents are only relevant to compliance proceedings, Oxarc submits that it will, alternatively, be satisfied with (1) a stipulation that the ALJ will not craft an order speaking to alleged damages or reinstatement until a compliance proceeding takes place, should a violation be found, and (2) a written instruction to Foster to preserve and maintain documents related to the information and documents requested in these requests.

C. Document Request Numbers 7 and 10 of the Subpoena are Appropriate and are not in Violation of Section 8(a)(1) of the Act

Document Request numbers 7 and 10 of the Subpoena request documents relating to Foster's alleged participation in protected union activity(ies). Counsel for the General Counsel opposes these requests on the grounds that they unlawfully infringe upon Foster's Section 7 rights. Counsel for the General Counsel's arguments miss the point of the requests entirely.

In *NLRB v. Robbins Tire & Rubber Co.*, cited by Counsel for the General Counsel, the Supreme Court upheld the Board's policy preventing parties in unfair labor practice proceeding from obtaining, in advance of the hearing, copies of statements collected during the investigation from potential witnesses. 437 U.S. 214 (1978). In so doing, the Court emphasized that a holding to the contrary would "disturb the existing balance of relations in unfair labor practice proceedings, a delicate balance that Congress has deliberately sought to preserve and that the Board maintains is essential to the effective enforcement of the NLRA." *Id.* at 236. Specifically, the Court emphasized that providing witness statements in advance of the hearing would create the obvious risk of employers intimidating employee witnesses prior to trial "in an effort to make them change their testimony or not testify at all." *Id.*

To accommodate this concern, the Board's "*Jencks*[1]" rule provides that a witness' pretrial statement will be furnished to a litigant only after Counsel for the General Counsel has called the witness on direct, to be used in cross-examination. *NLRB Rules and Regulations*, § 102.118(b)(1); *NLRB Division of Judges Bench Book*, § 8-500. That rule is founded upon the need "to forestall such intimidation and harassment as would otherwise be possible because of the leverage inherent in the employer-employee relationship." *NLRB v. Lizdale Knitting Mills, Inc.*, 523 F.2d 978, 980 (2d Cir. 1975).

Robbins is inapplicable to the present matter. First, Document Request numbers 7 and 10 of the Subpoena do not request Fosters' witness statement(s). In fact, instruction number 12 in Respondent's statement *specifically* provides otherwise:

> Through this subpoena, Respondent is not seeking the production of any affidavit prepared by the NLRB in the course of its investigation of this matter. To the extent you object to the production of documents and/or recordings requested by this subpoena on the grounds that compliance with the subpoena would require the

[1] For the origin of the rule, *see Jencks v. U.S.*, 353 U.S. 657 (1957).

> release or disclosure of documents and/or recordings that disclose the identities of employees or identify other alleged confidential or protected information, you are requested to produce all responsive documents and/or recordings for an in-camera inspection by the Administrative Law Judge for determination of whether claims involving the disclosure of employee identities or confidential or protected information are valid, or whether such information can be redacted so that the applicable documents and/or recordings can be produced to Respondent.

Respondent's deliberate inclusion of this instruction makes clear that, contrary to Counsel for the General Counsel's opinion, it understands the scope of a proper subpoena and is in no way including such Document Requests to unlawfully usurp Foster's protections under the National Labor Relations Act ("NLRA").

Second, even if these Document Requests envision the production of a witness statement made by Foster, there is no risk of intimidation, harassment, or retaliation, as there is indeed no employer-employee relationship to leverage. Foster is a *former* employee of Oxarc. Therefore, the Board's *Jencks* rule, the caselaw on which it is based, and the case law cited by Counsel for General Counsel in support of the present Petition to Revoke, are wholly inapplicable here. *Compare Wright Elec., Inc.*, 327 NLRB 1194 (1999), *enf'd* 200 F.3d 1162 (8th Cir. 2000) (involving the issue of whether respondent may obtain copies of union authorization cards by subpoena); *Chino Valley Med. Ctr.*, 362 NLRB 283 (2015), *enf'd sub. nom. United Nurses Ass'n of Cal. v. NLRB*, 871 F.3d 767 (9th Cir. 2017) (same); *Guess, Inc.*, 339 NLRB 432 (2003) (same); *National Tel. Directory Corp.*, 319 NLRB 420 (1995) (same).

To the contrary, the court has held that where subpoenaed communications between a union and an employee witness for the union are relevant to the employer's case and to the credibility of the employee, the ALJ ***should not*** revoke the subpoena in its entirety. Rather, the ALJ should require production of responsive information that would not infringe on any

confidentiality interests under *National Telephone* (such as the mere date and time of calls between the union and the employee), and should conduct an *in camera* review to determine if other responsive information that might infringe on employee confidentiality interests outweighs the employer's interests or to narrow the scope of the subpoena. *See Ozark Automotive Distributors, Inc. v. NLRB*, 779 F.3d 576 (D.C. Cir. 2015), *denying enf. and remanding* 357 NLRB 1041 (2011); *see also Veritas Health Services, Inc. v. NLRB*, 895 F.3d 69, 81 (D.C. Cir. 2018) (quashing the subpoena was an abuse of discretion "because the missing evidence prejudiced a critical element of that case").

While Counsel for the General Counsel's Petition to Revoke as to Document Request numbers 7 and 10 must be denied for the above reasons, as an alternative measure, and as set forth in instruction 12 to the Subpoena and codified in *National Telephone*, responsive documents could be produced for an in-camera inspection to determine which documents would be provided. The foregoing would necessarily address any Section 7 employee confidentiality interests potentially implicated by the document requests.

D. Document Request Numbers 8-9 and 11-12 of the Subpoena are Appropriate and Non-Privileged

Document Request numbers 8 and 9 seek documents and communications pertaining to any potential witnesses or persons with knowledge or facts pertinent to this action, as well as those that relate to Respondent's alleged violation of the NLRA. Document Request numbers 11 and 12 of the Subpoena concern emails, text messages, and documents that relate to the allegations in the Third Amended Complaint related to Foster. Counsel for the General Counsel maintains that such requests (i) are impermissible attempts at pre-trial discovery and (ii) seek privileged information. Each is addressed in turn below.

With regard to pre-trial discovery, Counsel for the General Counsel's argument ignores the obvious: Respondent is seeking documents to be produced *at the hearing* in this matter, not in advance thereof. Counsel for the General Counsel's argument related to the possibility of retaliation and further discrimination is wholly inapplicable, as Respondent will not have access to the information until the hearing has begun. Moreover, Foster is no longer an employee of Respondent and therefore is not at risk for retaliation or discrimination. Finally, Counsel for the General Counsel's claim in this matter of unlawful retaliation hinges on the fact that Respondent *must have known* about the alleged protected, concerted activity in which Foster engaged. *See Edifice Restoration Contractors, Inc.*, 360 NLRB 186, 193 (2014) (setting forth the requirements of a *prima facie* case of retaliation). Thus, any communications that identify the alleged activity, based on Counsel for the General Counsel's allegations, would relate to activity already known by Respondent. Consequently, there is again no risk of retaliation. The Board precedent cited by Counsel for the General Counsel is simply inapplicable.

With respect to the concern over privileged documents, Respondent is not seeking privileged communications. Again, Counsel for the General Counsel ignores, or fails to recognize, the purpose of the requests. As noted above, Respondent's knowledge of Foster's protected, concerted activity must be known by Respondent in order for the claim to prevail. Therefore, Respondent is seeking documents and communications that show Respondent's knowledge of Foster's activity. In other words, communications with Respondent or other witnesses regarding the alleged *known* activity. This is not meant to include privileged communications. On the contrary, the request is directed to Foster and seeks communications he himself had with potential witnesses, not communications the Board or the Union had with witnesses, or even with Foster. For avoidance of doubt, Respondent will stipulate to the fact and clarify that these requests do not

seek any documents subject to privilege or attorney work product, and only seek communications in Foster's possession that relate to Respondent's knowledge of his protected activity. Such clarification addresses the concerns raised by Counsel for the General Counsel and should be deemed a sufficient compromise.

IV. Conclusion

WHEREFORE, for all the reasons stated above, Respondent respectfully requests that Counsel for the General Counsel's Petition to Revoke Subpoena Duces Tecum No. B-1-19NVZAR be denied in its entirety.

Respectfully submitted this 24th day of July, 2020.

FISHER & PHILLIPS LLP

s/ Rick Grimaldi

Rick Grimaldi, Esquire
Samantha Sherwood Bononno, Esquire
Kelsey E. Beerer, Esquire

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Attorneys for Respondent Oxarc, Inc.

CERTIFICATE OF SERVICE

Pursuant to Section 102.114 of the Board's Rules and Regulations, I, Rick Grimaldi, Esquire, hereby certify that on the 24th day of July, 2020, the foregoing Response to the July 21, 2020 Order to Show Cause of Respondent Oxarc, Inc. in Opposition to Counsel for the General Counsel's Petition to Revoke Subpoena Duces Tecum No. B-1-19NVZAR was filed electronically and served via e-mail on all parties and counsel of record as follows:

(Via E-File)
The Honorable Gerald Etchingham
Associate Chief Judge

(Via E-Mail)
The Honorable Ariel L. Sotolongo
Administrative Law Judge
National Labor Relations Board
Division of Judges
Ariel.Sotolongo@nlrb.gov

Adam Morrison, Esquire
National Labor Relations Board, Region 19
Adam.Morrison@nlrb.gov

Matthew Harris, Esquire
Staff Attorney
International Brotherhood of Teamsters
mharris@teamster.org

s/ Rick Grimaldi
Rick Grimaldi, Esquire

Exhibit P

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

OXARC, INC.		
and	**Cases**	**19-CA-230472**
TEAMSTERS LOCAL 839		
and		**19-CA-237336** **19-CA-237499** **19-CA-238503**
TEAMSTERS LOCAL 690		
and		**19-CA-248391**
INTERNATIONAL BROTHERHOOD OF TEAMSTERS		
and		**19-CA-232728**
JARED FOSTER, an Individual		

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO REVOKE SUBPOENA DUCES TECUM

On December 9, 2019, the Regional Director for Region 19 of the Board issued the Third Consolidated Complaint in the above-captioned cases. The complaint alleges, inter alia, that Oxarc, Inc. ("Respondent"), discharged employee Jared Foster on June 14, 2018, which Respondent admits in its answer to the complaint, because Foster engaged in union and/or protected concerted activity, which Respondent denies. Thereafter, on July 15, 2020, Respondent served Subpoena Duces Tecum B-1-19NVZAR on Foster ("Subpoena"). On July 21, 2020, the General Counsel filed a Petition to revoke said subpoena ("Petition"), and on July 24, 2020, Respondent filed its response in opposition to the Petition. The Subpoena seeks the production of the following items by Foster:

1. Any and all Documents and/or Communications that reflect, relate to, or refer to any discipline or corrective action you received by Respondent during your employment with Respondent.

2. Any and all Documents and/or Communications that reflect, relate to, or refer to the termination of your employment with Respondent.
3. Any and all Documents and/or Communications that reflect, relate to, or refer to any discipline you received while employed by Respondent, including verbal warnings, written warnings or any discussions of performance or work rule violations.
4. Any and all Documents and/or Communications that reflect, relate to, or refer to any and all employment and/or offers of employment secured by you from June 14, 2018 to present.
5. Your tax returns, both state and federal, for the tax and/or calendar years 2018 through the present.
6. Any and all Documents that reflect, relate to, or refer to income you have received from June 14, 2018 to the present, including, but not limited to, any sums received from unemployment compensation, disability benefits, social security, workers' compensation, or other source(s).
7. Any and all Documents and/or Communications that reflect, relate to, or refer to any alleged union and/or protected concerted activities that you engaged in during your employment with Respondent.
8. Any and all Documents that relate to any Communications, oral or written, taken or received by you, of a potential witness or person with knowledge of facts pertinent to this Complaint.
9. Any and all Documents and/or Communications that reflect, relate to, or refer to the Respondent's alleged violation(s) of the National Labor Relations Act with respect to you.
10. Any and all Communications between you and the Union concerning the allegations contained in the Complaint.
11. Any and all e-mails or text messages that reflect, relate to, or refer to your claims at issue in this Complaint.
12. Any and all Documents which support, rebut, or otherwise concern the allegations contained in the Complaint.

The Board is authorized under Section 11(1) of the National Labor Relations Act to subpoena "any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question." *NLRB v. G.H.R. Energy Corp.*, 707 F.2d 110, 113 (5th Cir. 1982). Section 11(1) of the Act specifically provides that the Board shall revoke a subpoena only:

> …if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpoena does not describe with sufficient particularity the evidence whose production is required. Subpoenaed information must be produced if the information sought is "not plainly incompetent or irrelevant to any lawful purpose." *Endicott Johnson Corp. v. Perkins,* 317 U.S. 501, 509 (1943).

In this regard, I note that the Board and the courts have interpreted the concept of relevance, for subpoena purposes, quite broadly. Thus, subpoenaed information should be produced if it relates to any matter in question, or if it can provide background information or lead to other evidence potentially relevant to an allegation in the complaint. Board Rules, Section 102.31(b); *Perdue Farms*, 323 NLRB 345, 348 (1997), affd. in relevant part 144 F.3d 830, 833-834 (D.C. Cir. 1998) (the information needs to be only "reasonably relevant").

Although the General Counsel's and other parties' authority to subpoena information is expansive, it is not unlimited, and a valid nexus must exist between the issues raised by the pleadings and the items sought by the subpoena. Additionally, I must give proper consideration to issues of privacy and confidentiality, particularly if the potential relevance of subpoenaed items is only marginal. Moreover, even if the sought-after evidence may arguably be relevant, I must also take into consideration, pursuant to the Federal Rules of Evidence (FRE) Section 403, whether the evidence's probative value may be outweighed by the danger that such evidence may cause unfair prejudice, undue delay, confuse the issues, or be cumulative in nature and ultimately burden the record and thus delay the hearing. Keeping these principles in mind, I will address the various subpoenas and motions to revoke these.

Subpoena Items 1-3

In its Motion, the General Counsel argues that most, if not all, of the documents sought by Respondent from Foster in items 1-3 are already in Respondent's possession, inasmuch it was Respondent who initiated and issued the disciplinary actions described in the subpoena. To the extent that these are the documents sought by the subpoena, the General Counsel has a valid argument; Respondent, as the promulgator of the disciplinary actions, should already be in possession of such documents and is the best source for them. Accordingly, to the extent these documents are sought, the General Counsel's Motion is granted. Nonetheless, Respondent argues that Foster may be in possession of other documents that address or relates to such disciplinary actions, providing an example of a diary about these events that Foster may have kept. I agree with Respondent that any such documents would be relevant and subject to production, inasmuch they may reveal information that might be probative regarding the accuracy of information Foster may have provided to the General Counsel or the Charging Party unions. Such documents, however, to the extent that they reflect on the events discussed by Foster in any affidavit(s) provided to the Board during the course of the investigation, or in any communications with the union(s), need not be produced until Foster has testified in direct examination, and prior to his cross-examination. Accordingly, the General Counsel's Motion is denied with regard to other documents not generated by Respondent, provided they are produced at the time described above.

Subpoena Items 4-6

The General Counsel objects to the production of the documents sought in these subpoena items because they relate to backpay issues and mitigation of damages issues, arguing that those issues would only be relevant during a compliance proceeding such a backpay specification. I agree with the General Counsel. While it is true, as argued by Respondent, that if I find merit to the allegation in the complaint that Foster was unlawfully discharged, I would order his re-instatement and a make-whole remedy, the specifics of that remedy are not at issue in this proceeding. These items are thus not relevant to the instant proceeding, since only the lawfulness of Foster's discharge is at issue at this stage. Indeed, I were to find that this allegation lacks merit, the information sought by Respondent would not only be moot, but its disclosure might arguably have infringed on Foster's privacy and confidentiality rights in such circumstances. Accordingly, I grant the Motion to revoke these items of the subpoena.

Subpoena Items 7 and 10

In its Motion, the General Counsel argues that items 7 and 10 in Respondent's subpoena should be revoked because they seek information provided by Foster in his Board affidavit, because it because seeks protected communications between Foster and the union, and or protected communications between Foster and other employees—the latter information which the General Counsel argues is an unlawful request in violation of Section 8(a)(1), citing *Wright Elec., Inc.*, 327 NLRB 1194, 1195 (1999), *enf'd.* 200 F.3d 1162 (8th Cir. 2000); and *Chino Valley Med. Ctr.*, 362 NLRB 283, 283 n. 1 (2015), *enf'd. sub nom. United Nurses Ass'n of Cal. v. NLRB*, 871 F.3d 767 (9th Cir. 2017), as well as others. With regard to the argument that it is seeking a copy of Foster's Board affidavit through its subpoena, Respondent avers that it is not, pointing to item 12 of its subpoena instructions. Accordingly, I see no need to address this issue. With regard to the argument that communications between union and employees they represent—or seek to represent—are protected from disclosure through subpoena, there is strong support for this argument. See, *National Telephone Directory, Corp.*, 319 NLRB 420, 421-422 (1995); *Chino Valley*, supra. Certainly, to the extent that Foster may have provided a statement or other written materials to the union which address the same issues or conduct alleged in the complaint and which he addressed in his Board affidavit, it would be improper to direct Foster to disclose such information prior to his testimony on direct examination, lest Respondent obtain through the proverbial "back door" information it cannot obtain through the front door. Just as with his Board affidavit, this information or documents should be disclosed to Respondent after the conclusion of Foster's direct examination, not before. Accordingly, to that extent, I partly grant the General Counsel's motion to revoke. It is true, as Respondent points out, that other aspects of Foster's communications with the union are not protected from pre-direct testimony disclosure, such as mere date and time of calls and communications. See, e.g., *Ozark Automotive Distributors, Inc. v. NLRB*, 779 F3d. 576 (D.C. Cir. 2015). To that extent, I deny the General Counsel's motion, and direct that such information be provided. If there is any uncertainty as to whether the communications or documents at issue may fall into one of the above categories,

those documents should be presented to me, so that I may conduct an in-camera inspection, to determine whether any of the information in question is protected.

The above principles also hold true for communications between Foster and other employees, for example, to the extent the subpoena requests such records.[1] The potential to expose employees' protected activity, and possibly expose them to coercion or intimidation, in my view outweighs Respondent's right to such information, at least prior to testimony regarding the identity of such employees or the nature of their activity. Should Foster reveal the identity of such employees and/or the nature of their activities during the course of his direct examination, however, due process dictates that Respondent would then be entitled to receive any documents or communications exchanged between them and Foster that address the activities testified about, for purposes of cross-examination. Accordingly, I partly grant the General Counsel's motion in that regard. Finally, I note that the subpoena also potentially requests documents and communications regarding the issues alleged in the complaint between Foster and third parties not including the union or other employees. To the extent it does, such communications are not protected and should be disclosed pursuant to subpoena. Accordingly, the General Counsel's motion is denied in that regard.

Subpoena Items 8, 9, 11 and 12

The General Counsel objects to the above items on the basis that they appear to seek work product information, or information which is not subject to pre-trial discovery pursuant to Board rules. The language in the above-enumerated items, I find, is vague and ambiguous enough that it could be interpreted in the manner the General Counsel asserts. To the extent it is, I grant the General Counsel's motion, inasmuch communications between Foster and the General Counsel and the Union are protected not only for work-product reasons, but also for the reasons discussed above regarding other subpoena items. The principles as discussed above with regards to items 7 and 10 holds true for communications between Foster and other employees. While it is true that Foster is no longer an employee and thus not subject to potential intimidation or retaliation, as argued by Respondent, other current employees with whom Foster may have communicated regarding the allegations of the complaint would be subject to such potential retaliation or intimidation. Accordingly, as discussed above with regards to item 7 and 10, such communications need not be revealed unless and until Foster testifies about them during direct examination. Accordingly, the General Counsel's motion is granted in that respect. As discussed above, however, such protection does not extend to communications between Foster and third parties other than the Board, the union, or fellow employees. Any communications with such third parties must be disclosed, and the General Counsel's motion is denied in that regard. As with the other items discussed above, any uncertainty as to whether the communications or documents at issue may fall into one of the above categories, those

[1] In that regard, I need not address the General Counsel's contention that such subpoena request violates Section 8(a)(1) of the Act. Such allegation is not currently alleged in the complaint, so the issue is not before me.

documents should be presented to me, so that I may conduct an in-camera inspection, to determine whether any of the information in question is protected.

Accordingly, and for the above reasons, General Counsel's Motion to Revoke Subpoena is granted in part and denied in part.

So Ordered.

Dated at San Francisco, California, this 28th day of July 2020.

Ariel L. Sotolongo
Administrative Law Judge.

Served by email upon the following:

For the NLRB Region 19:
Adam D. Morrison, Esq.
Email: adam.morrison@nlrb.gov
Sarah McBride, Esq.,
Email:sarah.mcbride@nlrb.gov

For the Charging Party:
Matthew Harris, Staff Attorney,
Email: mharris@teamster.org
(IBT)

For the Respondent:
Rick Grimaldi, Esq.,
Email: rgrimaldi@fisherphillips.com
Samantha S. Bononno, Esq.,
Email: sbononno@fisherphillips.com
Kelsey E. Beerer, Esq.,
Email: kbeerer@fisherphillips.com
(Fisher Phillips, LLP)

Exhibit Q

FORM EXEMPT UNDER 44 U.S.C 3512

INTERNET FORM NLRB-501 (2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE	
Case	Date Filed
19-CA-263356	7/21/2020

INSTRUCTIONS:
File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer
Oxarc, Inc.

b. Tel. No. (509) 547-2494

c. Cell No. (509) 727-8060

f. Fax No.

d. Address *(Street, city, state, and ZIP code)*
716 S Oregon Ave.
Pasco, WA 99301

e. Employer Representative
Jason Kirby
General Manager

g. e-Mail
KBladowoxarc.com

h. Number of workers employed
25+

i. Type of Establishment *(factory, mine, wholesaler, etc.)*
Service

j. Identify principal product or service
Industrial Gases

k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and *(list subsections)* _____ of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge *(set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)*
Within past 6 months, the above-named Employer, acting through its legal counsel, violated employees Sec. 7 rights by issuing subpoena duces tecum, in associating with the hearing in Cases 19-CA-230472 et al., compelling the production of documents and communications related to employees' Union and/or protected concerted activities and other activities protected from disclosure under the Act.

3. Full name of party filing charge *(if labor organization, give full name, including local name and number)*
Teamsters Local 839

4a. Address *(Street and number, city, state, and ZIP code)*
1103 W. Sylvester
Pasco, WA 99301

4b. Tel. No. (509) 547-7513

4c. Cell No. (509) 551-9212

4d. Fax No.

4e. e-Mail
team839_adepaolo@outlook.co

5. Full name of national or international labor organization of which it is an affiliate or constituent unit *(to be filled in when charge is filed by a labor organization)*
International Brotherhood of Teamsters

6. DECLARATION
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By _____ Austin DePaolo, Business Agent
(signature of representative or person making charge) *(Print/type name and title or office, if any)*

Address 1103 W. Sylvester, Pasco, WA 99301

7/21/20
(date)

Tel. No. (509) 547-7513

Office, if any, Cell No. (509) 551-9212

Fax No.

e-Mail
team839_adepaolo@outlook.co

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

Exhibit R

fisherphillips.com

Philadelphia
Two Logan Square, 12th Floor
100 N. 18th Street
Philadelphia, PA 19103

(610) 230-2150 Tel
(610) 230-2151 Fax

Writer's Direct Dial:
610-230-2136

Writer's E-mail:
rgrimaldi@fisherphillips.com

July 30, 2020

Via E-File

J. Travis Williams, Board Agent
National Labor Relations Board, Region 19
915 Second Avenue, Room 2948
Seattle, Washington 98174

Re: Oxarc, Inc.
Case 19-CA-263356

Dear Mr. Williams:

On or about July 21, 2020, Teamsters Local 839 (the "Union") filed the above-referenced Unfair Labor Practice Charge ("ULP" or "Charge") against Oxarc, Inc. ("Oxarc" or "Employer"). By this letter, Oxarc is furnishing your office with its position and evidence[1] relative to the Charge.

I. FACTUAL BACKGROUND

Oxarc provides welding and industrial supplies, safety products and training, as well as industrial, medical and specialty gases. Oxarc employs drivers to represent Oxarc in delivering these materials to customers. These drivers are part of the Union. The Union and Oxarc were parties to a Collective Bargaining Agreement ("CBA") that expired on May 31, 2017. Accordingly, the parties began negotiations in April 2017 for a new CBA.

On February 28, 2019, the parties held their 34th and final negotiation session where Oxarc provided its Last, Best, and Final Offer ("LBFO"). At this time, Oxarc went through each provision of the offer for the Union and offered to answer any questions. Oxarc requested that the

[1] By submitting this position statement, Oxarc does not waive any objections or affirmative defenses. This position statement is provided with the understanding that Oxarc reserves the right to produce additional evidence and may supply further documentation at a later date. Accordingly, this letter consists only of a response and an initial statement of position with respect to the allegations made in the July 24, 2020 correspondence from the Board. It in no way reflects all of the possible affirmative defenses that may be available to Oxarc in response to those allegations or in the event of subsequent litigation.

Union put the offer to a vote but the Union refused. Oxarc therefore declared impasse. The Union stated their disagreement in only vague terms and failed to provide any substantive or specific example of any movement that might be made or how an agreement might be reached. Oxarc implemented its LBFO on March 11, 2019. The Parties have been operating under the implemented contract since that time.

Both during bargaining and following the implementation of the LFBO, the Union and/or its international and local counter-parts, filed multiple Unfair Labor Practices Charges (hereinafter "Trial ULPs") against Oxarc. The parties are scheduled for trial as to the issues as set forth in the remaining ULPs beginning August 3, 2020. Trial will be restricted to case numbers 19-CA-230472, 19-CA-237336, 19-CA-237499, 19-CA-238503, 19-CA-232728, and 19-CA-248391 (collectively referred to as "the Trial").

In preparation for the Trial, both parties served various subpoenas. Of relevance to the present ULP, on July 15, 2020, Oxarc served a Subpoena Duces Tecum, No. B-1-19NVZAR, on named party and ***former*** Oxarc employee, Jared Foster (hereinafter the "Foster Subpoena"). A true and correct copy of the foregoing subpoena is attached hereto as Exhibit A (hereinafter "Exhibit A").

Following service of the Foster Subpoena, pursuant to Rule 102.31(b) of the Board's Rules and Regulations, Counsel for the General Counsel filed a Petition to Revoke the Foster Subpoena (hereinafter "Petition to Revoke"). A true and correct copy of the Petition to Revoke is attached hereto as Exhibit B (hereinafter "Exhibit B"). The Petition to Revoke asserts, *inter alia*, that document request **numbers 7 and 10** are "inappropriate and ***likely*** violate § 8(a)(1) of the Act" and document request **number 8** "also ***potentially*** violates § 8(a)(1) of the Act."[2] *Id.* at pp. 4-6 and fn. 2. On July 21, 2020, the Administrative Law Judge (hereinafter "ALJ") ordered Oxarc to show cause as to why the Petition to Revoke should not be granted. A true and correct copy of the July 21, 2020 Order to Show Cause is attached hereto as Exhibit C (hereinafter "Exhibit C"). Oxarc filed its Response to the July 21, 2020 Order to Show Cause in Opposition to the Petition to Revoke on July 24, 2020. A true and correct copy of Oxarc's Response to the July 21, 2020 Order to Show Cause in Opposition to the Petition to Revoke is attached hereto as Exhibit D (hereinafter "Exhibit D").

On July 28, 2020, the ALJ issued an Order granting the Petition to Revoke in part and denying the Petition to Revoke in part (hereinafter the "July 28 ALJ Order"). A true and correct copy of the July 28 ALJ Order is attached hereto as Exhibit E (hereinafter "Exhibit E"). Though argued by Counsel for the General Counsel, the ALJ did not address the question of whether document requests numbers 7, 8, and 10, in themselves, are facial violations of the Act. *See generally* Exhibit E.

[2] It is worth mentioning that Counsel for the General Counsel did not argue that document request number 9 was or could be a violation of § 8(a)(1) of the Act. The foregoing is telling.

II. LEGAL ANALYSIS AND ARGUMENT

A. The Allegations as Set Forth in the ULP Are Moot.

The very allegations that form the basis of the present ULP have already been litigated. As detailed above, the Counsel for the General Counsel raised these issues in its Petition to Revoke the Foster Subpoena and, following Oxarc's Opposition, the ALJ made a determination. *See* Exhibits B, C, and E. Pursuant to the July 28 ALJ Order, document request numbers 7 through 10 have been revoked as it pertains to documents and communications between Foster and other employees, as well as documents and communications between Foster and the Union and/or General Counsel. *See* Exhibit E. Because the ALJ declined to speak to Counsel for the General Counsel's argument that document request numbers 7, 8, and 10 were facial violations of the Act, it is necessarily assumed that such argument was disregarded. Telling for this matter is the fact that the ALJ did not revoke document requests 7-10 in their entirety. On the contrary, the ALJ specifically noted that these requests do, in fact, request lawful and discoverable information. For example, the ALJ held that certain aspects of Foster's communications with the Union are not protected, such as date and time of calls and communications. *See* Exhibit E at p. 4-5. Further, the ALJ held that the requests lawfully request communications between Foster and third parties other than the union and Oxarc employees. *Id.* In short, the ALJ found that these requests all include discoverable information, and to the extent they seek information outside the lawful scope, they are revoked. Surely the ALJ would not have denied, in part, the Petition to Revoke if Respondent was acting unlawfully. Accordingly, the ULP is remedied.

Moreover, it bears mention that the Union, though aware of the Counsel to the General Counsel's Petition to Revoke, initiated the present ULP without any attempt to reconcile with Oxarc and/or await Oxarc's Opposition to Petition to Revoke. As we are less than one week before the Trial, the Union's motives are transparent.

For these reasons, the Board should adopt the July 28 ALJ Order, and, in doing so, find that the present ULP is moot and dismiss the Charge in its entirety.

B. The ULP Should Nonetheless be Dismissed on the Merits Because the Document Requests do not Infringe on Fosters' Section 7 Rights.

Should the Board not find that the ULP is moot, the Charge should nonetheless be dismissed as document request numbers 7 through 10 of the Foster Subpoena do not infringe on Foster's Section 7 rights.

In *NLRB v. Robbins Tire & Rubber Co.*, the Supreme Court upheld the Board's policy preventing parties in unfair labor practice proceeding from obtaining, in advance of the hearing, copies of statements collected during the investigation from potential witnesses. 437 U.S. 214 (1978). In so doing, the Court emphasized that a holding to the contrary would "disturb the existing balance of relations in unfair labor practice proceedings, a delicate balance that Congress has deliberately sought to preserve and that the Board maintains is essential to the effective

enforcement of the NLRA." *Id.* at 236. Specifically, the Court emphasized that providing witness statements in advance of the hearing would create the obvious risk of employers intimidating employee witnesses prior to trial "in an effort to make them change their testimony or not testify at all." *Id.*

To accommodate this concern, the Board's "Jencks[3]" rule provides that a witness' pretrial statement will be furnished to a litigant only after counsel for the General Counsel has called the witness on direct, to be used in cross-examination. NLRB Rules and Regulations, § 102.118(b)(1); NLRB Division of Judges Bench Book, § 8-500. That rule is founded upon the need "to forestall such intimidation and harassment as would otherwise be possible because of the leverage inherent in the employer-employee relationship." *NLRB v. Lizdale Knitting Mills, Inc.*, 523 F.2d 978, 980 (2d Cir. 1975).

Robbins is inapplicable to the present matter. First, Document request numbers 7 through 10 of the Subpoena do not request Fosters' witness statement(s). In fact, instruction number 12 in Respondent's statement specifically provides otherwise:

> Through this subpoena, Respondent is not seeking the production of any affidavit prepared by the NLRB in the course of its investigation of this matter. To the extent you object to the production of documents and/or recordings requested by this subpoena on the grounds that compliance with the subpoena would require the release or disclosure of documents and/or recordings that disclose the identities of employees or identify other alleged confidential or protected information, you are requested to produce all responsive documents and/or recordings for an in-camera inspection by the Administrative Law Judge for determination of whether claims involving the disclosure of employee identities or confidential or protected information are valid, or whether such information can be redacted so that the applicable documents and/or recordings can be produced to Respondent.

Exhibit A.

Respondent's deliberate inclusion of this instruction makes clear that, contrary to the Union's assertions, it understands the scope of a proper subpoena and is in no way including such document requests to unlawfully usurp Foster's protections under the National Labor Relations Act ("NLRA"). This was also confirmed by the ALJ in its July 28 ALJ Order on the Petition to Revoke. *See* Exhibit E at p. 4. Furthermore, for avoidance of any doubt, Respondent made clear in its Opposition to the Petition to Revoke that it was *not* seeking confidential communications. In other words, Respondent clarified that it was not seeking any documents outside lawful bounds. This confirmation, along with the subpoena's instructions, thwart the ULP.

Second, even if these Document Requests envision the production of a witness statement made by Foster, there is no risk of intimidation, harassment, or retaliation, as there is indeed no

[3] For the origin of the rule, *see Jencks v. U.S.*, 353 U.S. 657 (1957).

employer-employee relationship to leverage. Foster is a ***former*** employee of Oxarc. Therefore, the Board's *Jencks* rule and the caselaw on which it is based are wholly inapplicable here.

To the contrary, the court has held that where subpoenaed communications between a union and an employee witness for the union are relevant to the employer's case and to the credibility of the employee, the Board, or, where applicable, the ALJ should not revoke the subpoena in its entirety. Rather, the Board or ALJ should require production of responsive information that would not infringe on any confidentiality interests under *National Telephone,* 319 NLRB 420 (1995) (such as the mere date and time of calls between the union and the employee), and should conduct an *in camera* review to determine if other responsive information that might infringe on employee confidentiality interests outweighs the employer's interests or to narrow the scope of the subpoena. *See Ozark Automotive Distributors, Inc. v. NLRB*, 779 F.3d 576 (D.C. Cir. 2015), denying enf. and remanding 357 NLRB 1041 (2011); *see also Veritas Health Services, Inc. v. NLRB*, 895 F.3d 69, 81 (D.C. Cir. 2018) (quashing the subpoena was an abuse of discretion "because the missing evidence prejudiced a critical element of that case").

Document request numbers 7, 8, 9, and 10 are relevant to the issues being litigated at the Trial – i.e. whether or not Respondent violated the Act by unlawfully terminating Foster's employment. Even if, however, such requests infringed on confidentiality interests of Foster, *National Telephone* directs the ALJ or Board to engage in an in-camera inspection to determine which documents would be provided. The foregoing would necessarily address any Section 7 employee confidentiality interests potentially implicated by the document requests.

If the Union had taken the time to read Respondent's Opposition, it would have necessarily been briefed on the foregoing analysis, and, would have recognized Respondent's amenability to an in-camera inspection of the documents to determine which documents would be provided. Rather, the Union took the opportunity to, instead, file the present ULP without (1) waiting for a disposition on the Petition to Revoke and (2) without conferring with Respondent to find a middle-ground.

Respondent has not committed a violation of Section 8(a)(1) of the Act by its ***mere request*** for document request numbers 7, 8, 9, and 10 of the Foster Subpoena and requests that the Union's ULP be dismissed, in its entirety.

III. CONCLUSION

As a threshold matter, the Board must decide whether the issues within this ULP are moot. Oxarc submits that, as detailed above, the ALJ's disposition has remedied any ***alleged*** wrongdoing alleged by the Union. Alternatively, Oxarc respectfully requests that the Region forgo further

investigation and dismiss the Charge in its entirety. Should you require further information, please contact the undersigned.

Respectfully,

Rick Grimaldi, Esq.
Samantha Sherwood Bononno, Esq.
Kelsey E. Beerer, Esq.

Attachments

Exhibit A

Fisher Phillips

fisherphillips.com

Philadelphia
Two Logan Square, 12th Floor
100 N. 18th Street
Philadelphia, PA 19103

(610) 230-2150 Tel
(610) 230-2151 Fax

Writer's Direct Dial:
610-230-2172

Writer's E-mail:
sbononno@fisherphillips.com

July 15, 2020

VIA CERTIFIED MAIL

Jared Foster
6219 Wrigley Drive
Pasco, WA 99301

Re: ***Oxarc, Inc.***
Cases 19-CA-230472, et al.

Dear Mr. Foster:

As you know, this firm represents Oxarc, Inc. in connection with the above-referenced matter. Enclosed please find a subpoena and a subpoena duces tecum requiring you to appear and testify and to produce documents at the hearing to be held on August 3, 2020, along with a check representing witness fees. The witness fees include a $40.00 base rate.[1]

The hearing in the above-captioned matter is scheduled to occur via the videoconferencing platform, Zoom. The parties are expected to receive further information as to the procedures and protocols to be employed with respect to subpoenas at a later time and will supplement this correspondence, if necessary.

With respect to the Subpoena Duces Tecum, given the present circumstances, we will accept the documents via mail or e-mail on or before August 3, 2020 at the above address and/or e-mail address. Thank you for your anticipated cooperation.

Sincerely,

Samantha Sherwood Bononno, Esquire
For FISHER & PHILLIPS LLP

SSB:di
Enclosures

1 Should you incur any additional costs, please advise us as soon as possible in order to be reimbursed.

cc: Adam Morrison, Esquire (via email); Matthew Harris, Esquire (via email); and Roger Grimaldi, Esquire (via email)

FORM NLRB-32

SUBPOENA

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

To Jared Foster

6219 Wrigley Drive, Pasco, WA 99301

As requested by Samantha Sherwood Bononno, Esq. as counsel for Oxarc, Inc.

whose address is Two Logan Square, 12th Floor, 100 N. 18th St., Philadelphia, PA 19103
(Street) (City) (State) (ZIP)

YOU ARE HEREBY REQUIRED AND DIRECTED TO APPEAR BEFORE An Administrative Law Judge

of the National Labor Relations Board

at National Labor Relations Board

in the City of via Zoom video conference, the details of which will be provided.

on Monday, August 3, 2020, beginning at 9:00 a.m. or any adjourned

or rescheduled date to testify in Oxarc, Inc.
Cases 19-CA-230472, et al.
(Case Name and Number)

If you do not intend to comply with the subpoena, within 5 days (excluding intermediate Saturdays, Sundays, and holidays) after the date the subpoena is received, you must petition in writing to revoke the subpoena. Unless filed through the Board's E-Filing system, the petition to revoke must be received on or before the official closing time of the receiving office on the last day for filing. If filed through the Board's E-Filing system, it may be filed up to 11:59 pm in the local time zone of the receiving office on the last day for filing. Prior to a hearing, the petition to revoke should be filed with the Regional Director; during a hearing, it should be filed with the Hearing Officer or Administrative Law Judge conducting the hearing. See Board's Rules and Regulations, 29 C.F.R Section 102.31(b) (unfair labor practice proceedings) and/or 29 C.F.R. Section 102.66(c) (representation proceedings) and 29 C.F.R Section 102.111(a)(1) and 102.111(b)(3) (time computation). Failure to follow these rules may result in the loss of any ability to raise objections to the subpoena in court.

A-1-19NVXSV

Under the seal of the National Labor Relations Board, and by direction of the Board, this Subpoena is

Issued at Pasco, Washington

Dated: July 15, 2020

John Ring, Chairman

NOTICE TO WITNESS. Witness fees for attendance, subsistence, and mileage under this subpoena are payable by the party at whose request the witness is subpoenaed. A witness appearing at the request of the General Counsel of the National Labor Relations Board shall submit this subpoena with the voucher when claiming reimbursement.

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and/or unfair labor practice proceedings and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is mandatory in that failure to supply the information may cause the NLRB to seek enforcement of the subpoena in federal court.

Case 19-CA-230472

A-1-19NVXSV

RETURN OF SERVICE

I certify that, being a person over 18 years of age, I duly served a copy of this subpoena

(Check method used.)

- ☐ by person
- ☑ by certified mail
- ☐ by registered mail
- ☐ by telegraph
- ☐ by leaving copy at principal office or place of business at

_____

_____

_____

on the named person on

July 15, 2020

(Month, day, and year)

Danielle Innocenzo

(Name of person making service)

Legal Assistant

(Official title, if any)

CERTIFICATION OF SERVICE

I certify that named person was in attendance as a witness at

_____

on

(Month, day or days, and year)

_____

(Name of person certifying)

_____

(Official title)

FORM NLRB-31

SUBPOENA DUCES TECUM

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

To Jared Foster

6219 Wrigley Drive, Pasco, WA 99301

As requested by Samantha Sherwood Bononno, Esq. as counsel for Oxarc, Inc.

whose address is Two Logan Square, 12th Floor, 100 N. 18th St., Philadelphia, PA 19103
(Street) (City) (State) (ZIP)

YOU ARE HEREBY REQUIRED AND DIRECTED TO APPEAR BEFORE An Administrative Law Judge

of the National Labor Relations Board

at

in the City of via Zoom video conference, the details of which will be provided,

on Monday, August 3, 2020, beginning at 9:00 a.m. or any adjourned

or rescheduled date to testify in Oxarc, Inc.
Cases 19-CA-230472, et al.
(Case Name and Number)

And you are hereby required to bring with you and produce at said time and place the following books, records, correspondence, and documents via email in light of the Zoom nature of the hearing to sbononno@fisherphillips.com.

SEE ATTACHMENT

If you do not intend to comply with the subpoena, within 5 days (excluding intermediate Saturdays, Sundays, and holidays) after the date the subpoena is received, you must petition in writing to revoke the subpoena. Unless filed through the Board's E-Filing system, the petition to revoke must be received on or before the official closing time of the receiving office on the last day for filing. If filed through the Board's E-Filing system, it may be filed up to 11:59 pm in the local time zone of the receiving office on the last day for filing. Prior to a hearing, the petition to revoke should be filed with the Regional Director; during a hearing, it should be filed with the Hearing Officer or Administrative Law Judge conducting the hearing. See Board's Rules and Regulations, 29 C.F.R Section 102.31(b) (unfair labor practice proceedings) and/or 29 C.F.R. Section 102.66(c) (representation proceedings) and 29 C.F.R Section 102.111(a)(1) and 102.111(b)(3) (time computation). Failure to follow these rules may result in the loss of any ability to raise objections to the subpoena in court.

B-1-19NVZAR

Under the seal of the National Labor Relations Board, and by direction of the Board, this Subpoena is

Issued at Pasco, Washington

Dated: July 15, 2020

John Ring, Chairman

NOTICE TO WITNESS. Witness fees for attendance, subsistence, and mileage under this subpoena are payable by the party at whose request the witness is subpoenaed. A witness appearing at the request of the General Counsel of the National Labor Relations Board shall submit this subpoena with the voucher when claiming reimbursement.

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and/or unfair labor practice proceedings and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is mandatory in that failure to supply the information may cause the NLRB to seek enforcement of the subpoena in federal court.

Case 19-CA-230472

B-1-19NVZAR

RETURN OF SERVICE

I certify that, being a person over 18 years of age, I duly served a copy of this subpoena

(Check method used.)

- ☐ by person
- ☑ by certified mail
- ☐ by registered mail
- ☐ by telegraph
- ☐ by leaving copy at principal office or place of business at

_____

_____

_____

on the named person on

July 15, 2020

(Month, day, and year)

Danielle Innocenzo

(Name of person making service)

Legal Assistant

(Official title, if any)

CERTIFICATION OF SERVICE

I certify that named person was in attendance as a witness at

_____

on

(Month, day or days, and year)

_____

(Name of person certifying)

_____

(Official title)

ATTACHMENT TO SUBPOENA DUCES TECUM

Re: 19-CA-230472, et al.

DEFINITIONS AND INSTRUCTIONS

1) The word "Document" or "Documents" means, without limitation, the following items, whether printed or recorded or reproduced by any other mechanical or electronic process, or written or produced by hand, or any existing printed, typewritten, handwritten or otherwise recorded material of whatever kind and/or character, including, but not limited to: agreements, communications, correspondence, telegrams, letters, memoranda, facsimile transmissions, minutes, notes of any character, diaries, calendars, statements, affidavits, photographs, microfilm or microfiche, audio and/or video tapes, statistics, pamphlets, newsletters, press releases, bulletins, transcripts, summaries or records of telephone conversations, summaries or records of personal conversations or interviews, conferences, transcripts or summaries or reports of investigations and/or negotiations, drafts, internal or inter-office memoranda or correspondence, lists, data contained in computers, computer printouts, computer discs and/or files and all data contained therein, e-mail, any marginal or "post-it" or "sticky pad" comments appearing on or with documents, and all other writings, figures or symbols of any kind, including but not limited to carbon, photographic or other duplicative copies of any such material in the possession of, control of or available to the subpoenaed party, or any agent, representative, or other persons acting in cooperation with, in concert with, or on behalf of said subpoenaed party.

2) "Communications" means any correspondence, conversation, dialogue, discussion, interview, consultation, agreement, understanding between or among two or more persons, notice, transfer or exchange of information, expression of intent, inquiry or other direction, conveyance or receipt of facts or messages, by oral, written, face-to-face, electronic, telephonic means, or any other medium, including, but not limited to, emails and text messages.

3) The word "person" or "persons" means natural persons, corporation(s), partnership(s), sole proprietorship(s), associations(s), governmental entity or any other kind of entity.

4) "Respondent" means OXARC, INC., including any representatives with authority to act on its behalf.

5) "Union" means INTERNATIONAL BROTHERHOOD OF TEAMSTERS and any local charter, including any representatives with authority to act on their behalf.

6) "You," "your," and "FOSTER" means JARED FOSTER, including any representatives with authority to act on his behalf.

7) Unless otherwise defined herein, the term "Complaint" refers to the Third Consolidated Complaint and Notice of Hearing issued by the Regional Director for Region 19 on December 9, 2019, in connection with the above-referenced matter.

8) As to any documents not produced in compliance with this subpoena on any ground or if any document requested was, through inadvertence or otherwise destroyed or is no longer in your possession, please state:

a. the author;
b. the recipient;
c. the name of each person to whom the original or a copy was sent;
d. the date of the document;
e. the subject matter of the document; and
f. the circumstances under which the document was destroyed, withheld or is no longer in your possession.

9) This request is continuing in character and if additional responsive documents come to your attention following the date of production, such documents must be promptly produced.

10) This request seeks production of all documents described, including all drafts and non-identical or distribution copies and contemplates production of responsive documents in their entirety, without abbreviation, redaction, deletion or expurgation.

11) All documents produced pursuant to this subpoena are to be organized by what subpoena paragraph each document or documents are responsive, and labels referring to that subpoena paragraph are to be affixed to each document or set of documents.

12) Through this subpoena, Respondent is not seeking the production of any affidavit prepared by the NLRB in the course of its investigation of this matter. To the extent you object to the production of documents and/or recordings requested by this subpoena on the grounds that compliance with the subpoena would require the release or disclosure of documents and/or recordings that disclose the identities of employees or identify other alleged confidential or protected information, you are requested to produce all responsive documents and/or recordings for an in-camera inspection by the Administrative Law Judge for determination of whether claims involving the disclosure of employee identities or confidential or protected information are valid, or whether such information can be redacted so that the applicable documents and/or recordings can be produced to Respondent.

DOCUMENTS SUBJECT TO SUBPOENA

1. Any and all Documents and/or Communications that reflect, relate to, or refer to any discipline or corrective action you received by Respondent during your employment with Respondent.

2. Any and all Documents and/or Communications that reflect, relate to, or refer to the termination of your employment with Respondent.

3. Any and all Documents and/or Communications that reflect, relate to, or refer to any discipline you received while employed by Respondent, including verbal warnings, written warnings or any discussions of performance or work rule violations.

4. Any and all Documents and/or Communications that reflect, relate to, or refer to any and all employment and/or offers of employment secured by you from June 14, 2018 to present.

5. Your tax returns, both state and federal, for the tax and/or calendar years 2018 through the present.

6. Any and all Documents that reflect, relate to, or refer to income you have received from June 14, 2018 to the present, including, but not limited to, any sums received from unemployment compensation, disability benefits, social security, workers' compensation, or other source(s).

7. Any and all Documents and/or Communications that reflect, relate to, or refer to any alleged union and/or protected concerted activities that you engaged in during your employment with Respondent.

8. Any and all Documents that relate to any Communications, oral or written, taken or received by you, of a potential witness or person with knowledge of facts pertinent to this Complaint.

9. Any and all Documents and/or Communications that reflect, relate to, or refer to the Respondent's alleged violation(s) of the National Labor Relations Act with respect to you.

10. Any and all Communications between you and the Union concerning the allegations contained in the Complaint.

11. Any and all e-mails or text messages that reflect, relate to, or refer to your claims at issue in this Complaint.

12. Any and all Documents which support, rebut, or otherwise concern the allegations contained in the Complaint.

ORIGINAL CHECK HAS A COLORED BACKGROUND PRINTED ON CHEMICAL REACTIVE PAPER - SEE BACK FOR DETAILS

NO. 002571

Fisher & Phillips
150 N. Radnor Chester Road
Suite C300
Radnor, PA 19087

Form 515-BL

DATE 07-15-2020

AMOUNT
$******40.00**

PAY FORTY AND 00/100 DOLLARS
TO THE ORDER OF:
Jared Foster
6219 Wrigley Drive
Pasco, WA 99301

Authorized Signature

⑈00002571⑈ ⑆061000104⑆ 10000584273 69⑈

Fisher & Phillips

Request Number: 464129
Check Number: **NO. 002571**
Check Date: Jul 15/20

Payee: Jared Foster

Invoice #	Inv. Date	G/L Acct	Client	Matter	Narrative	Amount	Inv. Total
20201507FOSTER 15/20			47568	0013		40.00	40.00
					Invoice Totals:	$40.00	$40.00

Fisher & Phillips

Request Number: 464129
Check Number: 2571 **NO. 002571**
Check Date: 07-15-2020

Payee: Jared Foster

Invoice #	Inv. Date	G/L Acct	Client	Matter	Narrative	Amount	Inv. Total
20201507FOSTER 15/20			47568	0013		40.00	40.00
					Invoice Totals:	$40.00	$40.00

Exhibit B

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

OXARC, INC.	
and	Cases 19-CA-230472
TEAMSTERS LOCAL 839	
and	19-CA-237336 19-CA-237499 19-CA-238503
TEAMSTERS LOCAL 690	
and	19-CA-248391
INTERNATIONAL BROTHERHOOD OF TEAMSTERS	
and	19-CA-232728
JARED FOSTER, an Individual	

COUNSEL FOR THE GENERAL COUNSEL'S PETITION TO REVOKE THE SUBPOENA DUCES TECUM ISSUED TO CHARGING PARTY JARED FOSTER

Pursuant to Rule 102.31(b) of the Board's Rules and Regulations and Statements of Procedure (the "Board's Rules and Regulations"), Counsel for the General Counsel respectfully requests that Oxarc, Inc.'s ("Respondent") subpoena *duces tecum* B-1-19NVZAR (the "Subpoena"), issued to individual Charging Party Jared Foster ("Foster"), attached hereto as Exhibit A, be revoked in its entirety. Aside from the Subpoena being another naked attempt by Respondent to obtain impermissible pretrial discovery, it also seeks documents that are neither relevant to these proceedings nor that Respondent is

legally entitled to. In fact, as discussed below, Respondent reaches so far beyond what it is legally entitled to in seeking the § 7 activities and communications between Foster and his coworkers and his union that Respondent may actually be committing additional violations of the National Labor Relations Act (the "Act"), 29 U.S.C. 151 *et seq*.

A. Items #1-3 of the Subpoena Seek Respondent's Own Documents from Foster

In Items #1-3 of the Subpoena, Respondent seeks any discipline issued *by Respondent* to Foster, including his termination. To be clear, these are Respondent's *own* documents that Respondent created and then issued to Foster, and that Respondent is now requesting *from* Foster. This is ludicrous – they are documents under Respondent's control.

While it is unknown if Foster still even possess these documents or what Respondent's motivations are for requesting this information, clearly Respondent, not Foster, is in the best position to collect and obtain its own documents. Accordingly, Foster should not be compelled to provide copies of Respondent's own documents back to them. Nor should Foster bear the risk of a possible adverse inference being drawn for a lack of compliance with the Subpoena given Respondent is in control of the documents sought. *See CPS Chem. Co*., 324 NLRB 1018, 1019 (1997), *enf'd*. 160 F.3d 150 (3d Cir. 1998) (absence of documents did not prevent the Respondent from proving any relevant part of its case).

Even if this request were not so ill-founded, it is inexplicable given that Respondent admitted in its Answer to the Consolidated Complaint that it disciplined and discharged Foster on June 14, 2018. Thus, at least a portion of these Items seek documents for an issue that is not even in dispute in this matter. As the Act and Board case law clearly

hold, information sought through a subpoena under § 11(1) of the Act must be reasonably relevant to a matter in dispute in the proceedings. *See* 29 U.S.C. § 161(1) (petitions to revoke should be granted when information to be produced "does not relate to any matter . . . in question in [the] proceedings"); *CNN America, Inc*., 353 NLRB 891 (2009) (subpoenaed items must be reasonably relevant to the disputed matters under litigation); *Perdue Farms, Inc. v. NLRB,* 144 F.3d 830, 834 (D.C. Cir. 1998). Accordingly, Items # 1–3 of the Subpoena should be quashed.

B. Items #4-6 Are Not Relevant to the Merit Phase of This Proceeding

Respondent's requests in Items #4-6 seek various post-discharge financial and employment information from Foster related to Foster's potential backpay, including his mitigation efforts. It does not, however, seek any information concerning whether Respondent violated the Act as alleged in the Complaint, which is the only issue in this proceeding at this time. This is not a compliance proceeding after which Respondent has been found to be in violation of the Act as alleged.

The Board traditionally bifurcates complaint and compliance process.[1] *See, e.g., Great Lakes Chem. Corp*., 323 NLRB 749 (1997). The first stage, often called the "liability" or "merit" phase, only contains litigation on whether a respondent violated the Act as alleged in the complaint. *See* § 102.15 of the Board's Rules and Regulations (the initial complaint shall only include jurisdictional facts and "a concise description of the acts which are claimed to constitute unfair labor practices"). If the Board finds a violation, then

[1] The rare exception is, of course, when the Regional Director, pursuant to his authority in § 102.54(b) of the Board's Rules and Regulations, issues a combined complaint and compliance speculation, which has not been done in the instant matter.

the matter enters a second compliance stage. *See* § 102.54 of the Board's Rules and Regulations. There is no compliance specification as part of the instant complaint.

The information sought by Respondent in Items #4-6 of the Subpoena only relates to the potential compliance stage and does not relate, in any way, to the matters being litigated at this stage of the proceedings. As such, Items #4-6 of Respondent's Subpoena are clearly not relevant to a matter in dispute here and should be revoked. *See King Soopers, Inc*., 364 NLRB No. 93, slip op. at 8, 22 (2016) (granting the General Counsel's petition to revoke the respondent employer's subpoena duces tecum to the individual charging party seeking documentation of her search for work efforts and expenses, as the subpoenaed information was irrelevant at the merits stage of the proceeding), *vacated in part on other grounds* 859 F.3d 23 (D.C. Cir. 2017).

C. Items #7 and #10 Are Inappropriate and Likely Violate § 8(a)(1) of the Act

Item #7 seeks "all documents and communications . . . of [Foster's] alleged union and/or protected concerted activities." Likewise, Item #10 seeks "all documents and communications between Foster and his Union" concerning his allegation that Respondent discharged him. Respondent unsuccessfully sought this information from the General Counsel through its failed Motion for a Bill of Particulars ("Motion"), attempting to compel the General Counsel to identify and disclose the specific § 7 activity engaged in by Foster, prior to testimony in the upcoming hearing. In his July 13, 2020 Order denying the Motion, the Administrative Law Judge correctly ruled that the Complaint, as alleged, clearly complies with the Board's Rules and Regulations and that the disclosure of an alleged discriminatee's § 7 activities, prior the presentation of such evidence at the hearing, is not permitted. *See NLRB v. Robbins Tire & Rubber Co*., 437

U.S. 214 (1978) (upholding the Board's longstanding prohibition against pre-disclosure of employees' § 7 activities, prior to the testimony at hearing, because of the very real dangers posed by interference by a respondent, as in the instant case, who has been charged with violating employees' § 7 rights). Respondent, through its Subpoena, is now attempting to make an end run around that ruling by seeking the same information from an unrepresented individual charging party and alleged discriminatee. Not only is this reprehensible, but it is a wholly inappropriate and unlawful use of the subpoena process.

Respondent's subpoena has a primary and unlawful objective by attempting to compel Foster's and other employees' protected, concerted activities through Subpoena Item #7, and Foster's protected communications with the Union through Subpoena Item #10. "The Board zealously seeks to protect the confidentiality interests of employees because of the possibility of intimidation by employers who obtain the identity of employees engaged in organizing." *Wright Elec., Inc.*, 327 NLRB 1194, 1195 (1999), *enf'd.* 200 F.3d 1162 (8th Cir. 2000). Indeed, the Board takes this protection so seriously that an employer who seeks to compel an individual through subpoena to identity his and other employees' § 7 activities independently violates § 8(a)(1) of the Act. *See, e.g., Chino Valley Med. Ctr.*, 362 NLRB 283, 283, n.1 (2015) (8(a)(1) violation in issuing subpoenas duces tecum to employees attempting to compel them to disclose § 7 activities and communications), *enfd. sub nom*. *United Nurses Ass'n of Cal. v. NLRB***,** 871 F.3d 767 (9th Cir. 2017); *Guess?, Inc*., 339 NLRB 432 (2003) (8(a)(1) violated during deposition in a workers' compensation case by asking employee to reveal the identities of those who attended union meetings); *Wright Elec., Inc*., 327 NLRB at 1194 (8(a)(1) by

subpoenaing employee authorization cards in a state court lawsuit), *enf'd*. 200 F.3d. 1162, 1167 (8th Cir. 2000); *National Tel. Directory Corp.*, 319 NLRB 420, 421 (1995).

Moreover, any compelled response to Item #7 in the Subpoena would necessarily also include Foster's affidavit provided to the Board during the investigation of his charge. This is not permissible and would constitute a further violation of § 8(a)(1) of the Act. *See, e.g., Santa Barbara News-Press*, 361 NLRB 903, 903, n.1 (2014). Even if it didn't, under § 102.118(b)(1) of the Board's Rules and Regulations, the production of witness statements is *only* allowed *after the witnesses have testified* in a Board proceeding about subjects covered by such statements and a timely request for such statements is made for the purpose of cross-examination. *H.B. Zachry Co.*, 310 NLRB 1037, 1038 (1993).

Since it is well settled that a subpoena that has an unlawful objective (*i.e*., seeking to compel disclosure of an employees' § 7 activities or communications, as discussed above), is itself unlawful, the Subpoena must be quashed. *See Santa Barbara News-Press,* 358 NLRB 1539, 1539-40 (2012), *reaffirmed* 362 NLRB 252 (2015) (after *de novo* review in light of *NLRB v. Noel Canning*, 572 U.S. 513 (2014), Board reaffirmed prior decision); *Dilling Mech. Contractors, Inc.,* 357 NLRB 544, 546 (2011).

D. Items #8-9 and #11-12 Are Impermissible Attempts at Pre-Trial Discovery and Are Privileged by the Work Product and/or Attorney-Client Privileges

By these Items in the Subpoena, Respondent is once again requesting the General Counsel's evidence in support of the Complaint, this time by requesting it from Foster. Item #8 of the Subpoena seeks documents and communications with any "potential

witness or person with knowledge of facts pertinent to this Complaint."[2] Similarly, Item #9 seeks documents and communications concerning Respondent's "alleged violation(s) of the [Act] with respect to" Foster. Likewise, Item #11 seeks "all e-mails and text messages that reflect, relate to, or refer to [Foster's] claims at issue in the Complaint." And, in Item #12, Respondent seeks "documents, which support, rebut, or otherwise concern the allegations in the Complaint."

These four Subpoena Items, in sum, essentially seek from Foster all of the evidence in support of the Complaint allegations in advance of trial, including those documents prepared and submitted as part of the Board's investigatory process of his charge. This is, plainly and simply, impermissible pre-trial discovery. *See, e.g., Offshore Mariners United*, 338 NLRB 745, 746 (2002) (it is well established that the Board, with court approval, does not allow for pretrial discovery); *David R. Webb Co*., 311 NLRB 1135 (1993) (due to the unique nature of its jurisdiction, the Board does not permit pretrial discovery because of the very possibility of retaliation and further discrimination by a responded accused of violating employees' § 7 rights); *Mid-Atlantic Rest. Grp. LLC v. NLRB*, 722 Fed. Appx. 284, 287, n. 2 (3rd Cir. Jan. 25, 2018).

Not only are items #8-9 and #11-12 impermissible attempts at pretrial discovery, but many, if not all, of the documents that would potentially be responsive to these Subpoena Items are also protected as work-product privilege. To the extent such documents reflect the written work product, thought processes, and conversations of Board agents, they are protected from disclosure. *See Hickman v. Taylor*, 329 U.S. 495

[2] In addition to arguments made in this section, Respondent also potentially violates § 8(a)(1) of the Act with Item #8 because, as discussed above, it compels production of communications between Foster and other individuals that constitutes § 7-protected activity. *See Chino Valley Med. Ctr.*, 362 NLRB at 283.

(1947); Fed. R. Civ. P. 26(b)(3). In *Hickman*, the United States Supreme Court explained that the work-product protection encompasses "interviews, statements, memoranda, correspondence, briefs, mental impressions, [and] personal beliefs." 329 U.S. at 511. Moreover, the protection afforded work product under Fed. R. Civ. P. 26(b)(3) extends to material prepared by agents of the attorney as well as those prepared by the attorney himself, and continues beyond the litigation for which the documents at issue were prepared. *See U.S. v. Nobles*, 422 U.S. 225, 238-39 (1975); *FTC v. Grolier*, 462 U.S. 19 (1983). Therefore, the subpoenaed work product of the Board, even if requested through an individual charging party, is shielded from compelled production through F.R.C.P. 26(b)(3)'s directive that "the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney."

The Board also extends such protection from disclosure of other types of documents prepared and submitted as part of the Board's investigatory process. In *Kaiser Aluminum,* 339 NLRB 829 (2003), for example, the Board sustained the revocation of a subpoena calling for the production of a charging party's position statements because the position statements constituted "work product" within the meaning of Rule 26(b)(3) of the Federal Rules of Civil Procedure. Other correspondence with Board agents and other documentation or communications with the Board would likewise be privileged from disclosure as "work product" insofar as such documents necessarily would have been prepared by the Union or by Board agents during the investigation of the unfair labor practice charge and in anticipation of litigation and would reveal the mental impressions, conclusions, opinions, or legal theories of the Union and the General Counsel. Fed. R.

of Civ. P. 26(b)(3); *Hickman v. Taylor*, 329 U.S. at 495; *Central Tel. Co.*, 343 NLRB 987 (2004). Accordingly, Subpoena Items #8-9 and #11-12 should be quashed.

E. Conclusion

For the reasons set forth above and based upon well settled Board law, Counsel for the General Counsel respectfully requests that the Subpoena issued to individual Charging Party Jared Foster, in its entirety, be quashed.

Respectfully submitted this 21st day of July, 2020.

/s/ Sarah M. McBride
/s/ Adam D. Morrison
Sarah M. McBride and Adam D. Morrison
Counsel for General Counsel
National Labor Relations Board, Region 19
Jackson Federal Building
915 Second Avenue, 29th Floor
Seattle, WA 98174
Sarah.mcbride@nlrb.gov
Adam.morrison@nlrb.gov
(206) 220-6300 (phone)
(206) 220-6305 (fax)

FORM NLRB-31

SUBPOENA DUCES TECUM

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

To Jared Foster

6219 Wrigley Drive, Pasco, WA 99301

As requested by Samantha Sherwood Bononno, Esq. as counsel for Oxarc, Inc.

whose address is Two Logan Square, 12th Floor, 100 N. 18th St., Philadelphia, PA 19103
(Street) (City) (State) (ZIP)

YOU ARE HEREBY REQUIRED AND DIRECTED TO APPEAR BEFORE An Administrative Law Judge

of the National Labor Relations Board

at

in the City of via Zoom video conference, the details of which will be provided,

on Monday, August 3, 2020, beginning at 9:00 a.m. or any adjourned

or rescheduled date to testify in Oxarc, Inc. Cases 19-CA-230472, et al.
(Case Name and Number)

And you are hereby required to bring with you and produce at said time and place the following books, records, correspondence, and documents via email in light of the Zoom nature of the hearing to sbononno@fisherphillips.com.

SEE ATTACHMENT

If you do not intend to comply with the subpoena, within 5 days (excluding intermediate Saturdays, Sundays, and holidays) after the date the subpoena is received, you must petition in writing to revoke the subpoena. Unless filed through the Board's E-Filing system, the petition to revoke must be received on or before the official closing time of the receiving office on the last day for filing. If filed through the Board's E-Filing system, it may be filed up to 11:59 pm in the local time zone of the receiving office on the last day for filing. Prior to a hearing, the petition to revoke should be filed with the Regional Director; during a hearing, it should be filed with the Hearing Officer or Administrative Law Judge conducting the hearing. See Board's Rules and Regulations, 29 C.F.R Section 102.31(b) (unfair labor practice proceedings) and/or 29 C.F.R. Section 102.66(c) (representation proceedings) and 29 C.F.R Section 102.111(a)(1) and 102.111(b)(3) (time computation). Failure to follow these rules may result in the loss of any ability to raise objections to the subpoena in court.

B-1-19NVZAR

Under the seal of the National Labor Relations Board, and by direction of the Board, this Subpoena is

Issued at Pasco, Washington

Dated: July 15, 2020

John Ring, Chairman

NOTICE TO WITNESS. Witness fees for attendance, subsistence, and mileage under this subpoena are payable by the party at whose request the witness is subpoenaed. A witness appearing at the request of the General Counsel of the National Labor Relations Board shall submit this subpoena with the voucher when claiming reimbursement.

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Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and/or unfair labor practice proceedings and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is mandatory in that failure to supply the information may cause the NLRB to seek enforcement of the subpoena in federal court.

Exhibit A

Case 19-CA-230472

B-1-19NVZAR

RETURN OF SERVICE

I certify that, being a person over 18 years of age, I duly served a copy of this subpoena

(Check method used.)

- ☐ by person
- ☑ by certified mail
- ☐ by registered mail
- ☐ by telegraph
- ☐ by leaving copy at principal office or place of business at

_____

_____

_____

on the named person on

July 15, 2020

(Month, day, and year)

Danielle Innocenzo

(Name of person making service)

Legal Assistant

(Official title, if any)

CERTIFICATION OF SERVICE

I certify that named person was in attendance as a witness at

_____

on

(Month, day or days, and year)

_____

(Name of person certifying)

_____

(Official title)

ATTACHMENT TO SUBPOENA DUCES TECUM

Re: 19-CA-230472, et al.

DEFINITIONS AND INSTRUCTIONS

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8) As to any documents not produced in compliance with this subpoena on any ground or if any document requested was, through inadvertence or otherwise destroyed or is no longer in your possession, please state:

a. the author;
b. the recipient;
c. the name of each person to whom the original or a copy was sent;
d. the date of the document;
e. the subject matter of the document; and
f. the circumstances under which the document was destroyed, withheld or is no longer in your possession.

9) This request is continuing in character and if additional responsive documents come to your attention following the date of production, such documents must be promptly produced.

10) This request seeks production of all documents described, including all drafts and non-identical or distribution copies and contemplates production of responsive documents in their entirety, without abbreviation, redaction, deletion or expurgation.

11) All documents produced pursuant to this subpoena are to be organized by what subpoena paragraph each document or documents are responsive, and labels referring to that subpoena paragraph are to be affixed to each document or set of documents.

12) Through this subpoena, Respondent is not seeking the production of any affidavit prepared by the NLRB in the course of its investigation of this matter. To the extent you object to the production of documents and/or recordings requested by this subpoena on the grounds that compliance with the subpoena would require the release or disclosure of documents and/or recordings that disclose the identities of employees or identify other alleged confidential or protected information, you are requested to produce all responsive documents and/or recordings for an in-camera inspection by the Administrative Law Judge for determination of whether claims involving the disclosure of employee identities or confidential or protected information are valid, or whether such information can be redacted so that the applicable documents and/or recordings can be produced to Respondent.

DOCUMENTS SUBJECT TO SUBPOENA

1. Any and all Documents and/or Communications that reflect, relate to, or refer to any discipline or corrective action you received by Respondent during your employment with Respondent.

2. Any and all Documents and/or Communications that reflect, relate to, or refer to the termination of your employment with Respondent.

3. Any and all Documents and/or Communications that reflect, relate to, or refer to any discipline you received while employed by Respondent, including verbal warnings, written warnings or any discussions of performance or work rule violations.

4. Any and all Documents and/or Communications that reflect, relate to, or refer to any and all employment and/or offers of employment secured by you from June 14, 2018 to present.

5. Your tax returns, both state and federal, for the tax and/or calendar years 2018 through the present.

6. Any and all Documents that reflect, relate to, or refer to income you have received from June 14, 2018 to the present, including, but not limited to, any sums received from unemployment compensation, disability benefits, social security, workers' compensation, or other source(s).

7. Any and all Documents and/or Communications that reflect, relate to, or refer to any alleged union and/or protected concerted activities that you engaged in during your employment with Respondent.

8. Any and all Documents that relate to any Communications, oral or written, taken or received by you, of a potential witness or person with knowledge of facts pertinent to this Complaint.

9. Any and all Documents and/or Communications that reflect, relate to, or refer to the Respondent's alleged violation(s) of the National Labor Relations Act with respect to you.

10. Any and all Communications between you and the Union concerning the allegations contained in the Complaint.

11. Any and all e-mails or text messages that reflect, relate to, or refer to your claims at issue in this Complaint.

12. Any and all Documents which support, rebut, or otherwise concern the allegations contained in the Complaint.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Counsel for the General Counsel's Petition to Revoke the Subpoena Duces Tecum Issued to Charging Party Jared Foster was served on the 21st day of July, 2020, on the following parties:

E-File:

The Honorable Gerald Etchingham
Associate Chief Judge
National Labor Relations Board
Division of Judges
901 Market St., Ste. 300
San Francisco, CA 94103

E-Mail:

Rick Grimaldi, Esq.
Samantha S. Bononno, Esq.
Fisher Phillips, LLP
Email: rgrimaldi@fisherphillips.com
Email: sbononno@fisherphillips.com

Matthew Harris, Staff Attorney
International Brotherhood of Teamsters
Email: mharris@teamster.org

Kristy Kennedy

Kristy Kennedy, Office Manager

Exhibit C

Innocenzo, Danielle

From: JudgesDivision@nlrb.gov <e-Service@service.nlrb.gov>
Sent: Friday, July 24, 2020 11:17 AM
To: Innocenzo, Danielle
Subject: RE: 19-CA-230472 - Response to a Petition to Revoke a Subpoena

Confirmation Number: 1046371450

You have successfully accomplished the steps for E-Filing document(s) with the NLRB SF - Division of Judges. This E-mail notes the official date and time of the receipt of your submission. Please save this E-mail for future reference.

Date Submitted:	Friday, July 24, 2020 11:14 AM (UTC-05:00) Eastern Time (US & Canada)
Case Name:	Oxarc, Inc.
Case Number:	19-CA-230472
Filing Party:	Charged Party / Respondent
Name:	Rick Grimaldi
Email:	rgrimaldi@fisherphillips.com
Address:	Two Logan Square, 12th Floor
	100 N. 18th Street
	Philadelphia PA 19103
Telephone:	(610) 230-2136
Attachments:	Response to a Petition to Revoke a Subpoena: Oxarc Inc. - Opposition to General Counsel's Petition to Revoke Subpoena B-1-19NVZAR (7-24-20).pdf

****
DO NOT REPLY TO THIS MESSAGE. THIS IS A POST-ONLY NOTIFICATION.
MESSAGES SENT DIRECTLY TO THE EMAIL ADDRESS LISTED ABOVE WILL NOT BE READ.
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You have E-Filed your document(s) successfully. You will receive an E-Mail acknowledgement noting the official date and time we received your submission. Please save the E-Mail for future reference. You may wish to print this page for your records

Note: This confirms only that the document was filed. It does not constitute acceptance by the NLRB

Please be sure to make a note of this confirmation number.

Confirmation Number: 1046371450

Date Submitted: Friday, July 24, 2020 11:14 AM (UTC-05:00) Eastern Time (US & Canada)

Submitted E-File To Office: SF - Division of Judges

Case Number: 19-CA-230472

Case Name: Oxarc, Inc.

Filing Party: Charged Party / Respondent

Contact Information:

Rick Grimaldi

Two Logan Square, 12th Floor, 100 N. 18th Street, Philadelphia, PA 19103
Ph: (610) 230-2136
E-mail: rgrimaldi@fisherphillips.com
Additional E-mails: dinnocenzo@fisherphillips.com

Attached Documents:

Response to a Petition to Revoke a Subpoena:Oxarc Inc. - Opposition to General Counsel's Petition to Revoke Subpoena B-1-19NVZAR (7-24-20).pdf

Start Another E-Filing

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

OXARC, INC.	:	
	:	
and	:	CASES 19-CA-230472; 19-CA-237336;
	:	19-CA-237499; 19-CA-238503;
	:	19-CA-232728; 19-CA-248391
TEAMSTERS LOCAL 839	:	
	:	
and	:	
TEAMSTERS LOCAL 690	:	
	:	
and	:	
	:	
INTERNATIONAL BROTHERHOOD OF TEAMSTERS	:	
	:	
and	:	
	:	
JARED FOSTER, an individual.	:	

RESPONSE TO JULY 21, 2020 ORDER TO SHOW CAUSE OF RESPONDENT IN OPPOSITION TO COUNSEL FOR THE GENERAL COUNSEL'S PETITION TO REVOKE SUBPOENA DUCES TECUM NO. B-1-19NVZAR

Respondent Oxarc, Inc. ("Respondent" or "Oxarc"), by and through its undersigned counsel, hereby files this Response to the July 21, 2020 Order to Show Cause of Respondent Oxarc, Inc. in Opposition to Counsel for the General Counsel's Petition to Revoke Subpoena Duces Tecum No. B-1-19NVZAR.

I. Background

On July 15, 2020, Respondent served a named party, Jared Foster (hereinafter "Foster"), with Subpoena Duces Tecum No. B-1-19NVZAR (hereinafter "Subpoena"). In an Attachment to the Subpoena, Respondent requested twelve (12) enumerated categories of documents from Foster. In stark contrast to Counsel for the General Counsel's contentions, and as will be demonstrated below, Respondent's requests are both relevant and appropriate.

II. Applicable Legal Standards

Section 102.31(b) of the Board's Rules and Regulations states that a subpoena will be revoked if the evidence requested "does not relate to any matter under investigation or in question in the proceedings," the subpoena "does not describe with sufficient particularity the evidence whose production is required," or "if for any other reason sufficient in law the subpoena is otherwise invalid." 29 CFR § 102.31(b). In determining whether "any other reason sufficient in law" exists to revoke a subpoena, the Board has looked to the Federal Rules of Civil Procedure as "useful guidance." *Brink's Inc.*, 281 NLRB 468 (1986).

In ruling on a petition to revoke, the judge may evaluate the subpoena in light of any modifications or limitations that the subpoenaing party offers or agrees to in its opposition to the petition. *See, e.g., Bannum Place of Saginaw*, 7-CA-211090, 2018 WL 6628927, at *1 n. 2 (unpub. Board order issued Dec. 17, 2018); and *FCA US LLC*, 8-CA-185825, 2017 WL 5000838, at *1 n. 3 (unpub. Board order issued Oct. 31, 2007); *see also CNN America, Inc.*, 353 NLRB 891 (2009) (rejecting employer's argument that the General Counsel's subpoena "must stand or fall as a whole"), *final decision and order issued* 361 NLRB 439 (2014), *recons. denied* 362 NLRB No. 38 (2015), *rev. granted in part and denied in part* 865 F.3d 740 (D.C. Cir. 2017).

III. Arguments in Opposition to Counsel for the General Counsel's Petition to Revoke

A. Document Request Numbers 1 Through 3 of the Subpoena Are Relevant

Document Requests numbers 1 through 3 of the Subpoena request documents relating to Foster's discipline and termination. Counsel for the General Counsel maintains these document requests should be quashed for the following reasons: (1) the documents requested are under Respondent's control; and (2) the documents are irrelevant given that Respondent has admitted in

its Answer to the Third Consolidated Complaint that it disciplined and eventually terminated Foster's employment. Both arguments are unavailing.

First, the mere fact that Respondent possesses certain documents relevant to Foster's history of discipline and termination does not mean that Respondent possesses ***all*** such documents. *Bakery Workers*, 21-CA-171340, 2016 WL 4141212 (unpub. Board order issued Aug. 3, 2016) ("[T]he possibility that the requested information may be available from other sources is not a basis to quash a subpoena, as the requested documents may be necessary to corroborate or supplement the investigative file."). Foster may have documents relating to his discipline and termination that were not provided to Respondent during the course of Foster's employment. By way of example, Foster could have maintained a journal with excerpts specific to his discipline and/or termination. In addition, Foster could be in possession of communications such as text messages that speak to his discipline and/or termination of employment from Respondent.

Second, Foster does not bear the risk of an adverse inference if he truthfully and completely responds to the Subpoena, which, may include a response that he is not in possession of such documents. Succinctly stated, the adverse inference rule consists of the principle that "when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him." *Auto Workers v. NLRB*, 459 F.2d 1329, 1335-1336 (D.C. Cir. 1972) (describing the adverse inference rule as "more a product of common sense than of the common law"); *see also Metro-West Ambulance Service, Inc.*, 360 NLRB No. 124 at pp. 2-3 and at fn. 13 (2014); *SKC Electric*, 350 NLRB 857, 872 (2007). There is a difference between a deliberate failure to produce documents in one's possession and an acknowledgment that one is not in possession of such documents and/or no such documents exist. *Compare Shamrock Foods Co. v. NLRB*, 779 F. App'x 752, 754-55 (D.C. Cir. 2019) ("The Board is entitled

to impose a variety of sanctions to deal with subpoena noncompliance, including permitting the party seeking production to use secondary evidence, precluding the noncomplying party from rebutting that evidence or cross-examining witnesses about it, and drawing adverse inferences against the noncomplying party."). There can be no fear of an adverse inference if Foster responds to the document requests based on the documents in his possession.

Moreover, the asserted nonexistence of requested records is not grounds for revoking a subpoena. *See Ironworkers Local 433*, 21-CB-129959, 2015 WL 471558 (unpub. Board order issued Feb. 4, 2015) ("If no evidence responsive to any portion of the subpoena exists, the custodian of records must provide sworn testimony to that effect, including a description of the [party's] efforts to identify and locate such evidence.").

Third, Respondent's admission to disciplining Foster and terminating his employment does not render Document Request numbers 1 through 3 irrelevant. According to Counsel for the General Counsel, it remains disputed as to whether Foster's discipline and termination were causally related to his alleged engagement in union protected activities. As discussed above, Foster may be in possession of self-created documents, or communications with non-Respondent third-parties that are relevant for purposes of bolstering Respondent's position that it legitimately disciplined Foster and terminated his employment and, further, that the decision had no bearing on Foster's alleged engagement in protected union activities.

For these reasons, Document Request numbers 1 through 3 should not be revoked.

B. Document Request Numbers 4 Through 6 of the Subpoena are Hereby Preserved for a Compliance Proceeding, if Applicable

Document Request numbers 4 through 6 relate to Foster's post-employment financial state and mitigation efforts. Counsel for the General Counsel petitions to revoke these requests because

they are not relevant to the merit phase of this proceeding. As detailed below, these requests are relevant.

If the ALJ finds Respondent violated the Act with respect to Foster, the ALJ will necessarily impose a remedy. Having information related to Foster's current employment is not necessary for this purpose and therefore not premature. *See, e.g.*, *Hennes & Mauritz, LP d/b/a H&M and United for Respect*, Cases 32-CA-250461, 2020 WL 3440105 (June 22, 2020 (Sotolongo, J.) (finding that the employer unlawfully discharged its employee and ordering remedy of reinstatement and make-whole remedy). On the contrary, the ALJ must determine whether reinstatement, for example, is a proper remedy. *See id.* Foster's post-employment financial records and mitigation efforts are required to determine whether there can even be a make-whole remedy. If Foster has secured immediate employment, and if he makes the same or more than he was making at Oxarc, this will necessarily impact that analysis.

As to Counsel for the General Counsel's contention that such documents are only relevant to compliance proceedings, Oxarc submits that it will, alternatively, be satisfied with (1) a stipulation that the ALJ will not craft an order speaking to alleged damages or reinstatement until a compliance proceeding takes place, should a violation be found, and (2) a written instruction to Foster to preserve and maintain documents related to the information and documents requested in these requests.

C. Document Request Numbers 7 and 10 of the Subpoena are Appropriate and are not in Violation of Section 8(a)(1) of the Act

Document Request numbers 7 and 10 of the Subpoena request documents relating to Foster's alleged participation in protected union activity(ies). Counsel for the General Counsel opposes these requests on the grounds that they unlawfully infringe upon Foster's Section 7 rights. Counsel for the General Counsel's arguments miss the point of the requests entirely.

In *NLRB v. Robbins Tire & Rubber Co.*, cited by Counsel for the General Counsel, the Supreme Court upheld the Board's policy preventing parties in unfair labor practice proceeding from obtaining, in advance of the hearing, copies of statements collected during the investigation from potential witnesses. 437 U.S. 214 (1978). In so doing, the Court emphasized that a holding to the contrary would "disturb the existing balance of relations in unfair labor practice proceedings, a delicate balance that Congress has deliberately sought to preserve and that the Board maintains is essential to the effective enforcement of the NLRA." *Id.* at 236. Specifically, the Court emphasized that providing witness statements in advance of the hearing would create the obvious risk of employers intimidating employee witnesses prior to trial "in an effort to make them change their testimony or not testify at all." *Id.*

To accommodate this concern, the Board's "*Jencks*[1]" rule provides that a witness' pretrial statement will be furnished to a litigant only after Counsel for the General Counsel has called the witness on direct, to be used in cross-examination. *NLRB Rules and Regulations*, § 102.118(b)(1); *NLRB Division of Judges Bench Book*, § 8-500. That rule is founded upon the need "to forestall such intimidation and harassment as would otherwise be possible because of the leverage inherent in the employer-employee relationship." *NLRB v. Lizdale Knitting Mills, Inc.*, 523 F.2d 978, 980 (2d Cir. 1975).

Robbins is inapplicable to the present matter. First, Document Request numbers 7 and 10 of the Subpoena do not request Fosters' witness statement(s). In fact, instruction number 12 in Respondent's statement *specifically* provides otherwise:

> Through this subpoena, Respondent is not seeking the production of any affidavit prepared by the NLRB in the course of its investigation of this matter. To the extent you object to the production of documents and/or recordings requested by this subpoena on the grounds that compliance with the subpoena would require the

[1] For the origin of the rule, *see Jencks v. U.S.*, 353 U.S. 657 (1957).

> release or disclosure of documents and/or recordings that disclose the identities of employees or identify other alleged confidential or protected information, you are requested to produce all responsive documents and/or recordings for an in-camera inspection by the Administrative Law Judge for determination of whether claims involving the disclosure of employee identities or confidential or protected information are valid, or whether such information can be redacted so that the applicable documents and/or recordings can be produced to Respondent.

Respondent's deliberate inclusion of this instruction makes clear that, contrary to Counsel for the General Counsel's opinion, it understands the scope of a proper subpoena and is in no way including such Document Requests to unlawfully usurp Foster's protections under the National Labor Relations Act ("NLRA").

Second, even if these Document Requests envision the production of a witness statement made by Foster, there is no risk of intimidation, harassment, or retaliation, as there is indeed no employer-employee relationship to leverage. Foster is a *former* employee of Oxarc. Therefore, the Board's *Jencks* rule, the caselaw on which it is based, and the case law cited by Counsel for General Counsel in support of the present Petition to Revoke, are wholly inapplicable here. *Compare Wright Elec., Inc.*, 327 NLRB 1194 (1999), *enf'd* 200 F.3d 1162 (8th Cir. 2000) (involving the issue of whether respondent may obtain copies of union authorization cards by subpoena); *Chino Valley Med. Ctr.*, 362 NLRB 283 (2015), *enf'd sub. nom. United Nurses Ass'n of Cal. v. NLRB*, 871 F.3d 767 (9th Cir. 2017) (same); *Guess, Inc.*, 339 NLRB 432 (2003) (same); *National Tel. Directory Corp.*, 319 NLRB 420 (1995) (same).

To the contrary, the court has held that where subpoenaed communications between a union and an employee witness for the union are relevant to the employer's case and to the credibility of the employee, the ALJ ***should not*** revoke the subpoena in its entirety. Rather, the ALJ should require production of responsive information that would not infringe on any

confidentiality interests under *National Telephone* (such as the mere date and time of calls between the union and the employee), and should conduct an *in camera* review to determine if other responsive information that might infringe on employee confidentiality interests outweighs the employer's interests or to narrow the scope of the subpoena. *See Ozark Automotive Distributors, Inc. v. NLRB*, 779 F.3d 576 (D.C. Cir. 2015), *denying enf. and remanding* 357 NLRB 1041 (2011); *see also Veritas Health Services, Inc. v. NLRB*, 895 F.3d 69, 81 (D.C. Cir. 2018) (quashing the subpoena was an abuse of discretion "because the missing evidence prejudiced a critical element of that case").

While Counsel for the General Counsel's Petition to Revoke as to Document Request numbers 7 and 10 must be denied for the above reasons, as an alternative measure, and as set forth in instruction 12 to the Subpoena and codified in *National Telephone*, responsive documents could be produced for an in-camera inspection to determine which documents would be provided. The foregoing would necessarily address any Section 7 employee confidentiality interests potentially implicated by the document requests.

D. Document Request Numbers 8-9 and 11-12 of the Subpoena are Appropriate and Non-Privileged

Document Request numbers 8 and 9 seek documents and communications pertaining to any potential witnesses or persons with knowledge or facts pertinent to this action, as well as those that relate to Respondent's alleged violation of the NLRA. Document Request numbers 11 and 12 of the Subpoena concern emails, text messages, and documents that relate to the allegations in the Third Amended Complaint related to Foster. Counsel for the General Counsel maintains that such requests (i) are impermissible attempts at pre-trial discovery and (ii) seek privileged information. Each is addressed in turn below.

With regard to pre-trial discovery, Counsel for the General Counsel's argument ignores the obvious: Respondent is seeking documents to be produced *at the hearing* in this matter, not in advance thereof. Counsel for the General Counsel's argument related to the possibility of retaliation and further discrimination is wholly inapplicable, as Respondent will not have access to the information until the hearing has begun. Moreover, Foster is no longer an employee of Respondent and therefore is not at risk for retaliation or discrimination. Finally, Counsel for the General Counsel's claim in this matter of unlawful retaliation hinges on the fact that Respondent *must have known* about the alleged protected, concerted activity in which Foster engaged. *See Edifice Restoration Contractors, Inc.*, 360 NLRB 186, 193 (2014) (setting forth the requirements of a *prima facie* case of retaliation). Thus, any communications that identify the alleged activity, based on Counsel for the General Counsel's allegations, would relate to activity already known by Respondent. Consequently, there is again no risk of retaliation. The Board precedent cited by Counsel for the General Counsel is simply inapplicable.

With respect to the concern over privileged documents, Respondent is not seeking privileged communications. Again, Counsel for the General Counsel ignores, or fails to recognize, the purpose of the requests. As noted above, Respondent's knowledge of Foster's protected, concerted activity must be known by Respondent in order for the claim to prevail. Therefore, Respondent is seeking documents and communications that show Respondent's knowledge of Foster's activity. In other words, communications with Respondent or other witnesses regarding the alleged *known* activity. This is not meant to include privileged communications. On the contrary, the request is directed to Foster and seeks communications he himself had with potential witnesses, not communications the Board or the Union had with witnesses, or even with Foster. For avoidance of doubt, Respondent will stipulate to the fact and clarify that these requests do not

seek any documents subject to privilege or attorney work product, and only seek communications in Foster's possession that relate to Respondent's knowledge of his protected activity. Such clarification addresses the concerns raised by Counsel for the General Counsel and should be deemed a sufficient compromise.

IV. Conclusion

WHEREFORE, for all the reasons stated above, Respondent respectfully requests that Counsel for the General Counsel's Petition to Revoke Subpoena Duces Tecum No. B-1-19NVZAR be denied in its entirety.

Respectfully submitted this 24th day of July, 2020.

FISHER & PHILLIPS LLP

s/ Rick Grimaldi

Rick Grimaldi, Esquire
Samantha Sherwood Bononno, Esquire
Kelsey E. Beerer, Esquire

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kbeerer@fisherphillips.com

Attorneys for Respondent Oxarc, Inc.

CERTIFICATE OF SERVICE

Pursuant to Section 102.114 of the Board's Rules and Regulations, I, Rick Grimaldi, Esquire, hereby certify that on the 24th day of July, 2020, the foregoing Response to the July 21, 2020 Order to Show Cause of Respondent Oxarc, Inc. in Opposition to Counsel for the General Counsel's Petition to Revoke Subpoena Duces Tecum No. B-1-19NVZAR was filed electronically and served via e-mail on all parties and counsel of record as follows:

(Via E-File)
The Honorable Gerald Etchingham
Associate Chief Judge

(Via E-Mail)
The Honorable Ariel L. Sotolongo
Administrative Law Judge
National Labor Relations Board
Division of Judges
Ariel.Sotolongo@nlrb.gov

Adam Morrison, Esquire
National Labor Relations Board, Region 19
Adam.Morrison@nlrb.gov

Matthew Harris, Esquire
Staff Attorney
International Brotherhood of Teamsters
mharris@teamster.org

s/ Rick Grimaldi
Rick Grimaldi, Esquire

Exhibit D

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

OXARC, INC.

and **Cases 19-CA-230472**

TEAMSTERS LOCAL 839

and **Cases 19-CA-237336**
19-CA-237499
19-CA-238503

TEAMSTERS LOCAL 690

and **Case 19-CA-248391**

INTERNATIONAL BROTHERHOOD OF TEAMSTERS

and **Case 19-CA-232728**

JARED FOSTER, AN INDIVIDUAL

ORDER TO SHOW CAUSE REGARDING COUNSEL FOR THE GENERAL COUNSEL'S PETITION TO REVOKE SUBPOENA

On July 21, 2020, counsel for the General Counsel filed a Petition to Revoke subpoena duces tecum B-1-19NVZAR in the above matter. The hearing is set to commence on August 3, 2020, at 9 a.m. by Zoom videoconference.

Counsel for the Respondent is hereby given until no later than close of business on Friday, July 24, 2020 to show why counsel for the General Counsel's Petition to Revoke subpoena should not be granted.

SO ORDERED.

Dated at San Francisco, California, this 21st day of July 2020.

Ariel L. Sotolongo
Administrative Law Judge.

Served by email upon the following:

For the NLRB Region 19:
Adam D. Morrison, Esq.
Email: adam.morrison@nlrb.gov
Sarah McBride, Esq.,
Email:sarah.mcbride@nlrb.gov

For the Charging Party:
Matthew Harris, Staff Attorney,
Email: mharris@teamster.org
(IBT)

For the Respondent:
Rick Grimaldi, Esq.,
Email: rgrimaldi@fisherphillips.com
Samantha S. Bononno, Esq.,
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Kelsey E. Beerer, Esq.,
Email: kbeerer@fisherphillips.com
(Fisher Phillips, LLP)

Exhibit E

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

OXARC, INC.		
and	**Cases**	**19-CA-230472**
TEAMSTERS LOCAL 839		
and		**19-CA-237336** **19-CA-237499** **19-CA-238503**
TEAMSTERS LOCAL 690		
and		**19-CA-248391**
INTERNATIONAL BROTHERHOOD OF TEAMSTERS		
and		**19-CA-232728**
JARED FOSTER, an Individual		

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO REVOKE SUBPOENA DUCES TECUM

On December 9, 2019, the Regional Director for Region 19 of the Board issued the Third Consolidated Complaint in the above-captioned cases. The complaint alleges, inter alia, that Oxarc, Inc. ("Respondent"), discharged employee Jared Foster on June 14, 2018, which Respondent admits in its answer to the complaint, because Foster engaged in union and/or protected concerted activity, which Respondent denies. Thereafter, on July 15, 2020, Respondent served Subpoena Duces Tecum B-1-19NVZAR on Foster ("Subpoena"). On July 21, 2020, the General Counsel filed a Petition to revoke said subpoena ("Petition"), and on July 24, 2020, Respondent filed its response in opposition to the Petition. The Subpoena seeks the production of the following items by Foster:

1. Any and all Documents and/or Communications that reflect, relate to, or refer to any discipline or corrective action you received by Respondent during your employment with Respondent.

2. Any and all Documents and/or Communications that reflect, relate to, or refer to the termination of your employment with Respondent.
3. Any and all Documents and/or Communications that reflect, relate to, or refer to any discipline you received while employed by Respondent, including verbal warnings, written warnings or any discussions of performance or work rule violations.
4. Any and all Documents and/or Communications that reflect, relate to, or refer to any and all employment and/or offers of employment secured by you from June 14, 2018 to present.
5. Your tax returns, both state and federal, for the tax and/or calendar years 2018 through the present.
6. Any and all Documents that reflect, relate to, or refer to income you have received from June 14, 2018 to the present, including, but not limited to, any sums received from unemployment compensation, disability benefits, social security, workers' compensation, or other source(s).
7. Any and all Documents and/or Communications that reflect, relate to, or refer to any alleged union and/or protected concerted activities that you engaged in during your employment with Respondent.
8. Any and all Documents that relate to any Communications, oral or written, taken or received by you, of a potential witness or person with knowledge of facts pertinent to this Complaint.
9. Any and all Documents and/or Communications that reflect, relate to, or refer to the Respondent's alleged violation(s) of the National Labor Relations Act with respect to you.
10. Any and all Communications between you and the Union concerning the allegations contained in the Complaint.
11. Any and all e-mails or text messages that reflect, relate to, or refer to your claims at issue in this Complaint.
12. Any and all Documents which support, rebut, or otherwise concern the allegations contained in the Complaint.

The Board is authorized under Section 11(1) of the National Labor Relations Act to subpoena "any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question." *NLRB v. G.H.R. Energy Corp.*, 707 F.2d 110, 113 (5th Cir. 1982). Section 11(1) of the Act specifically provides that the Board shall revoke a subpoena only:

> …if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpoena does not describe with sufficient particularity the evidence whose production is required. Subpoenaed information must be produced if the information sought is "not plainly incompetent or irrelevant to any lawful purpose." *Endicott Johnson Corp. v. Perkins,* 317 U.S. 501, 509 (1943).

In this regard, I note that the Board and the courts have interpreted the concept of relevance, for subpoena purposes, quite broadly. Thus, subpoenaed information should be produced if it relates to any matter in question, or if it can provide background information or lead to other evidence potentially relevant to an allegation in the complaint. Board Rules, Section 102.31(b); *Perdue Farms*, 323 NLRB 345, 348 (1997), affd. in relevant part 144 F.3d 830, 833-834 (D.C. Cir. 1998) (the information needs to be only "reasonably relevant").

Although the General Counsel's and other parties' authority to subpoena information is expansive, it is not unlimited, and a valid nexus must exist between the issues raised by the pleadings and the items sought by the subpoena. Additionally, I must give proper consideration to issues of privacy and confidentiality, particularly if the potential relevance of subpoenaed items is only marginal. Moreover, even if the sought-after evidence may arguably be relevant, I must also take into consideration, pursuant to the Federal Rules of Evidence (FRE) Section 403, whether the evidence's probative value may be outweighed by the danger that such evidence may cause unfair prejudice, undue delay, confuse the issues, or be cumulative in nature and ultimately burden the record and thus delay the hearing. Keeping these principles in mind, I will address the various subpoenas and motions to revoke these.

Subpoena Items 1-3

In its Motion, the General Counsel argues that most, if not all, of the documents sought by Respondent from Foster in items 1-3 are already in Respondent's possession, inasmuch it was Respondent who initiated and issued the disciplinary actions described in the subpoena. To the extent that these are the documents sought by the subpoena, the General Counsel has a valid argument; Respondent, as the promulgator of the disciplinary actions, should already be in possession of such documents and is the best source for them. Accordingly, to the extent these documents are sought, the General Counsel's Motion is granted. Nonetheless, Respondent argues that Foster may be in possession of other documents that address or relates to such disciplinary actions, providing an example of a diary about these events that Foster may have kept. I agree with Respondent that any such documents would be relevant and subject to production, inasmuch they may reveal information that might be probative regarding the accuracy of information Foster may have provided to the General Counsel or the Charging Party unions. Such documents, however, to the extent that they reflect on the events discussed by Foster in any affidavit(s) provided to the Board during the course of the investigation, or in any communications with the union(s), need not be produced until Foster has testified in direct examination, and prior to his cross-examination. Accordingly, the General Counsel's Motion is denied with regard to other documents not generated by Respondent, provided they are produced at the time described above.

Subpoena Items 4-6

The General Counsel objects to the production of the documents sought in these subpoena items because they relate to backpay issues and mitigation of damages issues, arguing that those issues would only be relevant during a compliance proceeding such a backpay specification. I agree with the General Counsel. While it is true, as argued by Respondent, that if I find merit to the allegation in the complaint that Foster was unlawfully discharged, I would order his re-instatement and a make-whole remedy, the specifics of that remedy are not at issue in this proceeding. These items are thus not relevant to the instant proceeding, since only the lawfulness of Foster's discharge is at issue at this stage. Indeed, I were to find that this allegation lacks merit, the information sought by Respondent would not only be moot, but its disclosure might arguably have infringed on Foster's privacy and confidentiality rights in such circumstances. Accordingly, I grant the Motion to revoke these items of the subpoena.

Subpoena Items 7 and 10

In its Motion, the General Counsel argues that items 7 and 10 in Respondent's subpoena should be revoked because they seek information provided by Foster in his Board affidavit, because it because seeks protected communications between Foster and the union, and or protected communications between Foster and other employees—the latter information which the General Counsel argues is an unlawful request in violation of Section 8(a)(1), citing *Wright Elec., Inc.*, 327 NLRB 1194, 1195 (1999), *enf'd.* 200 F.3d 1162 (8th Cir. 2000); and *Chino Valley Med. Ctr.*, 362 NLRB 283, 283 n. 1 (2015), *enf'd. sub nom. United Nurses Ass'n of Cal. v. NLRB*, 871 F.3d 767 (9th Cir. 2017), as well as others. With regard to the argument that it is seeking a copy of Foster's Board affidavit through its subpoena, Respondent avers that it is not, pointing to item 12 of its subpoena instructions. Accordingly, I see no need to address this issue. With regard to the argument that communications between union and employees they represent—or seek to represent—are protected from disclosure through subpoena, there is strong support for this argument. See, *National Telephone Directory, Corp.*, 319 NLRB 420, 421-422 (1995); *Chino Valley*, supra. Certainly, to the extent that Foster may have provided a statement or other written materials to the union which address the same issues or conduct alleged in the complaint and which he addressed in his Board affidavit, it would be improper to direct Foster to disclose such information prior to his testimony on direct examination, lest Respondent obtain through the proverbial "back door" information it cannot obtain through the front door. Just as with his Board affidavit, this information or documents should be disclosed to Respondent after the conclusion of Foster's direct examination, not before. Accordingly, to that extent, I partly grant the General Counsel's motion to revoke. It is true, as Respondent points out, that other aspects of Foster's communications with the union are not protected from pre-direct testimony disclosure, such as mere date and time of calls and communications. See, e.g., *Ozark Automotive Distributors, Inc. v. NLRB*, 779 F3d. 576 (D.C. Cir. 2015). To that extent, I deny the General Counsel's motion, and direct that such information be provided. If there is any uncertainty as to whether the communications or documents at issue may fall into one of the above categories,

those documents should be presented to me, so that I may conduct an in-camera inspection, to determine whether any of the information in question is protected.

The above principles also hold true for communications between Foster and other employees, for example, to the extent the subpoena requests such records.[1] The potential to expose employees' protected activity, and possibly expose them to coercion or intimidation, in my view outweighs Respondent's right to such information, at least prior to testimony regarding the identity of such employees or the nature of their activity. Should Foster reveal the identity of such employees and/or the nature of their activities during the course of his direct examination, however, due process dictates that Respondent would then be entitled to receive any documents or communications exchanged between them and Foster that address the activities testified about, for purposes of cross-examination. Accordingly, I partly grant the General Counsel's motion in that regard. Finally, I note that the subpoena also potentially requests documents and communications regarding the issues alleged in the complaint between Foster and third parties not including the union or other employees. To the extent it does, such communications are not protected and should be disclosed pursuant to subpoena. Accordingly, the General Counsel's motion is denied in that regard.

Subpoena Items 8, 9, 11 and 12

The General Counsel objects to the above items on the basis that they appear to seek work product information, or information which is not subject to pre-trial discovery pursuant to Board rules. The language in the above-enumerated items, I find, is vague and ambiguous enough that it could be interpreted in the manner the General Counsel asserts. To the extent it is, I grant the General Counsel's motion, inasmuch communications between Foster and the General Counsel and the Union are protected not only for work-product reasons, but also for the reasons discussed above regarding other subpoena items. The principles as discussed above with regards to items 7 and 10 holds true for communications between Foster and other employees. While it is true that Foster is no longer an employee and thus not subject to potential intimidation or retaliation, as argued by Respondent, other current employees with whom Foster may have communicated regarding the allegations of the complaint would be subject to such potential retaliation or intimidation. Accordingly, as discussed above with regards to item 7 and 10, such communications need not be revealed unless and until Foster testifies about them during direct examination. Accordingly, the General Counsel's motion is granted in that respect. As discussed above, however, such protection does not extend to communications between Foster and third parties other than the Board, the union, or fellow employees. Any communications with such third parties must be disclosed, and the General Counsel's motion is denied in that regard. As with the other items discussed above, any uncertainty as to whether the communications or documents at issue may fall into one of the above categories, those

[1] In that regard, I need not address the General Counsel's contention that such subpoena request violates Section 8(a)(1) of the Act. Such allegation is not currently alleged in the complaint, so the issue is not before me.

documents should be presented to me, so that I may conduct an in-camera inspection, to determine whether any of the information in question is protected.

Accordingly, and for the above reasons, General Counsel's Motion to Revoke Subpoena is granted in part and denied in part.

So Ordered.

Dated at San Francisco, California, this 28th day of July 2020.

Ariel L. Sotolongo
Administrative Law Judge.

Served by email upon the following:

For the NLRB Region 19:
Adam D. Morrison, Esq.
Email: adam.morrison@nlrb.gov
Sarah McBride, Esq.,
Email:sarah.mcbride@nlrb.gov

For the Charging Party:
Matthew Harris, Staff Attorney,
Email: mharris@teamster.org
(IBT)

For the Respondent:
Rick Grimaldi, Esq.,
Email: rgrimaldi@fisherphillips.com
Samantha S. Bononno, Esq.,
Email: sbononno@fisherphillips.com
Kelsey E. Beerer, Esq.,
Email: kbeerer@fisherphillips.com
(Fisher Phillips, LLP)

Exhibit S

From: Morrison, Adam D. <Adam.Morrison@nlrb.gov>
Sent: Sunday, August 2, 2020 1:40 PM
To: Grimaldi, Rick; Bononno, Samantha; Beerer, Kelsey; Sotolongo, Ariel L.; Harris, Matthew; McBride, Sarah M; Eskenazi, Mark
Cc: Jack Holland
Subject: Oxarc, Inc.; 19-CA-230472 et al.
Attachments: GC Exhibit 17 Amended Complaint Allegation 8-3-20.pdf

Follow Up Flag: Follow up
Flag Status: Flagged

Re: Notice of Intent to Request Amending the Complaint at Hearing

Dear Parties, Judge Sotolongo, and Court Room Deputy Eskenazi:

Please allow this email to serve as notice of Counsel for the General Counsel's intent to seek permission to amend the Consolidated Complaint at the opening of the hearing to add the following allegation (copy also attached):

> *On about July 15, 2020, Respondent, through its legal counsel, issued Subpoenas Duces Tecum to Jared Foster, Teamsters Local 839, and the International Brotherhood of Teamsters seeking to compel the disclosure of Foster's and other employees' Section 7 activities.*
>
> *By the acts described above, Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in § 7 of the Act in violation of § 8(a)(1) of the Act.*

The allegation is based upon a charge filed by Teamsters Local 839 on July 21, 2020, in Case 19-CA-263356, which the Region decided over the weekend. Accordingly, this allegation arose within the past two weeks, in preparation for this hearing. As Counsel for the General Counsel, it our belief that adding this allegation will not substantially lengthen the hearing or prejudice Respondent, as the facts pertaining to this allegation are likely not to be in dispute. Thus, this issue is primarily a legal one that can be addressed by the parties in their post-hearing briefs.

Thank you,

Adam D. Morrison
National Labor Relations Board
Spokane, WA Resident Agent, Region 19
P.O. Box 28447
Spokane, WA 99208
(office) (202) 208-0537
(cell) (202) 679-4062
(fax) (202) 827-4062
Adam.Morrison@nlrb.gov

Allegation to be Added:

On about July 15, 2020, Respondent, through its legal counsel, issued Subpoenas Duces Tecum to Jared Foster, Teamsters Local 839, and the International Brotherhood of Teamsters seeking to compel the disclosure of Foster's and other employees' Section 7 activities.

By the acts described above, Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in § 7 of the Act in violation of § 8(a)(1) of the Act.

Exhibit T

From: Grimaldi, Rick
Sent: Sunday, August 2, 2020 2:49 PM
To: Morrison, Adam D.; Bononno, Samantha; Beerer, Kelsey; Sotolongo, Ariel L.; Harris, Matthew; McBride, Sarah M; Eskenazi, Mark
Cc: Jack Holland
Subject: RE: Oxarc, Inc.; 19-CA-230472 et al.
Attachments: AS FILED Oxarc - Position Statement (Case 19-CA-263356).pdf

Dear Parties, Judge Sotolongo, and Court Room Deputy Eskenazi:

Please accept this correspondence as Respondent's objection to the General Counsel's request to amend the Third Consolidated Complaint.

Pursuant to §102.15 of the Board's Rules and Regulations, after a charge has been filed, if it appears to the Regional Director that formal proceedings may be instituted, the Director ***will*** issue and serve on all parties a formal complaint in the Board's name stating the alleged unfair labor practices and containing a Notice of Hearing before an Administrative Law Judge at a fixed place and at a time ***not less than 14 days after the service of the complaint***. (Emphasis added).

There has been no formal complaint issued on the allegation the General Counsel seeks to add at this eleventh hour. If the Regional Director has found merit to Charge No. 19-CA-2263356, he must issue a complaint, which has not been done in this case. If the General Counsel seeks to consolidate this charge with the upcoming hearing in this matter, then a Fourth Amended Complaint must be issued. That complaint, pursuant to §102.15, must include a notice of hearing *not less than 14 days* after such issuance. Including this allegation in a hearing set for tomorrow is in direct contravention of the Rules, is highly prejudicial to Respondent and infringes upon its due process rights.

Moreover, pursuant to §102.20 of the Board's Rules and Regulations, Respondent must file an answer to any complaint issued by the Regional Director. Respondent has 14 days to do so. *Id.* Therefore, should the Regional Director issue a complaint, or should the ALJ grant the General Counsel's motion, Respondent has the right to answer it and may not be forced to do so in less than 14 days.

Without waiver of Respondent's right to answer and defend against this allegation, this issue is moot and has already been remedied by the ALJ's July 28, 2020 Order. We have attached Respondent's position statement for further details related to this argument.

Rick Grimaldi
Attorney at Law
Fisher & Phillips LLP
Two Logan Square | 12th Floor | 100 N. 18th Street | Philadelphia, PA 19103
rgrimaldi@fisherphillips.com | O: (610) 230-2136 |
vCard | Bio | Website *On the Front Lines of Workplace Law℠*

From: Morrison, Adam D. <Adam.Morrison@nlrb.gov>
Sent: Sunday, August 2, 2020 1:40 PM

To: Grimaldi, Rick <rgrimaldi@fisherphillips.com>; Bononno, Samantha <sbononno@fisherphillips.com>; Beerer, Kelsey <kbeerer@fisherphillips.com>; Sotolongo, Ariel L. <Ariel.Sotolongo@nlrb.gov>; Harris, Matthew <mharris@teamster.org>; McBride, Sarah M <Sarah.McBride@nlrb.gov>; Eskenazi, Mark <Mark.Eskenazi@nlrb.gov>
Cc: Jack Holland <Jack@rmbllaw.com>
Subject: Oxarc, Inc.; 19-CA-230472 et al.

Re: Notice of Intent to Request Amending the Complaint at Hearing

Dear Parties, Judge Sotolongo, and Court Room Deputy Eskenazi:

Please allow this email to serve as notice of Counsel for the General Counsel's intent to seek permission to amend the Consolidated Complaint at the opening of the hearing to add the following allegation (copy also attached):

> *On about July 15, 2020, Respondent, through its legal counsel, issued Subpoenas Duces Tecum to Jared Foster, Teamsters Local 839, and the International Brotherhood of Teamsters seeking to compel the disclosure of Foster's and other employees' Section 7 activities.*
>
> *By the acts described above, Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in § 7 of the Act in violation of § 8(a)(1) of the Act.*

The allegation is based upon a charge filed by Teamsters Local 839 on July 21, 2020, in Case 19-CA-263356, which the Region decided over the weekend. Accordingly, this allegation arose within the past two weeks, in preparation for this hearing. As Counsel for the General Counsel, it our belief that adding this allegation will not substantially lengthen the hearing or prejudice Respondent, as the facts pertaining to this allegation are likely not to be in dispute. Thus, this issue is primarily a legal one that can be addressed by the parties in their post-hearing briefs.

Thank you,

Adam D. Morrison
National Labor Relations Board
Spokane, WA Resident Agent, Region 19
P.O. Box 28447
Spokane, WA 99208
(office) (202) 208-0537
(cell) (202) 679-4062
(fax) (202) 827-4062
Adam.Morrison@nlrb.gov

Innocenzo, Danielle

From: NLRBRegion19@nlrb.gov <e-Service@service.nlrb.gov>
Sent: Thursday, July 30, 2020 2:57 PM
To: Innocenzo, Danielle
Subject: RE: 19-CA-263356 - Position Statement

Confirmation Number: 1047257110

You have successfully accomplished the steps for E-Filing document(s) with the NLRB Region 19, Seattle, Washington. This E-mail notes the official date and time of the receipt of your submission. Please save this E-mail for future reference.

Date Submitted:	Thursday, July 30, 2020 11:50 AM (UTC-08:00) Pacific Time (US & Canada)
Regional, Subregional Or Resident Office:	Region 19, Seattle, Washington
Case Name:	Oxarc, Inc.
Case Number:	19-CA-263356
Filing Party:	Charged Party / Respondent
Name:	Rick Grimaldi
Email:	rgrimaldi@fisherphillips.com
Address:	Two Logan Square, 12th Floor
	100 N. 18th Street
	Philadelphia PA 19103
Telephone:	(610) 230-2150
Attachments:	Position Statement: Oxarc - Position Statement (Case 19-CA-263356).pdf

****
DO NOT REPLY TO THIS MESSAGE. THIS IS A POST-ONLY NOTIFICATION.
MESSAGES SENT DIRECTLY TO THE EMAIL ADDRESS LISTED ABOVE WILL NOT BE READ.
****

You have E-Filed your document(s) successfully. You will receive an E-Mail acknowledgement noting the official date and time we received your submission. Please save the E-Mail for future reference. You may wish to print this page for your records

Note: This confirms only that the document was filed. It does not constitute acceptance by the NLRB

Please be sure to make a note of this confirmation number.

Confirmation Number: 1047257110

Date Submitted: Thursday, July 30, 2020 11:50 AM (UTC-08:00) Pacific Time (US & Canada)

Submitted E-File To Office: Region 19, Seattle, Washington

Case Number: 19-CA-263356

Case Name: Oxarc, Inc.

Filing Party: Charged Party / Respondent

Contact Information:

Rick Grimaldi

Two Logan Square, 12th Floor, 100 N. 18th Street, Philadelphia, PA 19103
Ph: (610) 230-2150
E-mail: rgrimaldi@fisherphillips.com
Additional E-mails: dinnocenzo@fisherphillips.com

Attached Documents:

Position Statement:Oxarc - Position Statement (Case 19-CA-263356).pdf

Start Another E-Filing

fisherphillips.com

Philadelphia
Two Logan Square, 12th Floor
100 N. 18th Street
Philadelphia, PA 19103

(610) 230-2150 Tel
(610) 230-2151 Fax

Writer's Direct Dial:
610-230-2136

Writer's E-mail:
rgrimaldi@fisherphillips.com

July 30, 2020

Via E-File

J. Travis Williams, Board Agent
National Labor Relations Board, Region 19
915 Second Avenue, Room 2948
Seattle, Washington 98174

Re: Oxarc, Inc.
Case 19-CA-263356

Dear Mr. Williams:

On or about July 21, 2020, Teamsters Local 839 (the "Union") filed the above-referenced Unfair Labor Practice Charge ("ULP" or "Charge") against Oxarc, Inc. ("Oxarc" or "Employer"). By this letter, Oxarc is furnishing your office with its position and evidence[1] relative to the Charge.

I. FACTUAL BACKGROUND

Oxarc provides welding and industrial supplies, safety products and training, as well as industrial, medical and specialty gases. Oxarc employs drivers to represent Oxarc in delivering these materials to customers. These drivers are part of the Union. The Union and Oxarc were parties to a Collective Bargaining Agreement ("CBA") that expired on May 31, 2017. Accordingly, the parties began negotiations in April 2017 for a new CBA.

On February 28, 2019, the parties held their 34th and final negotiation session where Oxarc provided its Last, Best, and Final Offer ("LBFO"). At this time, Oxarc went through each provision of the offer for the Union and offered to answer any questions. Oxarc requested that the

[1] By submitting this position statement, Oxarc does not waive any objections or affirmative defenses. This position statement is provided with the understanding that Oxarc reserves the right to produce additional evidence and may supply further documentation at a later date. Accordingly, this letter consists only of a response and an initial statement of position with respect to the allegations made in the July 24, 2020 correspondence from the Board. It in no way reflects all of the possible affirmative defenses that may be available to Oxarc in response to those allegations or in the event of subsequent litigation.

Union put the offer to a vote but the Union refused. Oxarc therefore declared impasse. The Union stated their disagreement in only vague terms and failed to provide any substantive or specific example of any movement that might be made or how an agreement might be reached. Oxarc implemented its LBFO on March 11, 2019. The Parties have been operating under the implemented contract since that time.

Both during bargaining and following the implementation of the LFBO, the Union and/or its international and local counter-parts, filed multiple Unfair Labor Practices Charges (hereinafter "Trial ULPs") against Oxarc. The parties are scheduled for trial as to the issues as set forth in the remaining ULPs beginning August 3, 2020. Trial will be restricted to case numbers 19-CA-230472, 19-CA-237336, 19-CA-237499, 19-CA-238503, 19-CA-232728, and 19-CA-248391 (collectively referred to as "the Trial").

In preparation for the Trial, both parties served various subpoenas. Of relevance to the present ULP, on July 15, 2020, Oxarc served a Subpoena Duces Tecum, No. B-1-19NVZAR, on named party and ***former*** Oxarc employee, Jared Foster (hereinafter the "Foster Subpoena"). A true and correct copy of the foregoing subpoena is attached hereto as Exhibit A (hereinafter "Exhibit A").

Following service of the Foster Subpoena, pursuant to Rule 102.31(b) of the Board's Rules and Regulations, Counsel for the General Counsel filed a Petition to Revoke the Foster Subpoena (hereinafter "Petition to Revoke"). A true and correct copy of the Petition to Revoke is attached hereto as Exhibit B (hereinafter "Exhibit B"). The Petition to Revoke asserts, *inter alia*, that document request **numbers 7 and 10** are "inappropriate and ***likely*** violate § 8(a)(1) of the Act" and document request **number 8** "also ***potentially*** violates § 8(a)(1) of the Act."[2] *Id.* at pp. 4-6 and fn. 2. On July 21, 2020, the Administrative Law Judge (hereinafter "ALJ") ordered Oxarc to show cause as to why the Petition to Revoke should not be granted. A true and correct copy of the July 21, 2020 Order to Show Cause is attached hereto as Exhibit C (hereinafter "Exhibit C"). Oxarc filed its Response to the July 21, 2020 Order to Show Cause in Opposition to the Petition to Revoke on July 24, 2020. A true and correct copy of Oxarc's Response to the July 21, 2020 Order to Show Cause in Opposition to the Petition to Revoke is attached hereto as Exhibit D (hereinafter "Exhibit D").

On July 28, 2020, the ALJ issued an Order granting the Petition to Revoke in part and denying the Petition to Revoke in part (hereinafter the "July 28 ALJ Order"). A true and correct copy of the July 28 ALJ Order is attached hereto as Exhibit E (hereinafter "Exhibit E"). Though argued by Counsel for the General Counsel, the ALJ did not address the question of whether document requests numbers 7, 8, and 10, in themselves, are facial violations of the Act. *See generally* Exhibit E.

[2] It is worth mentioning that Counsel for the General Counsel did not argue that document request number 9 was or could be a violation of § 8(a)(1) of the Act. The foregoing is telling.

II. LEGAL ANALYSIS AND ARGUMENT

A. The Allegations as Set Forth in the ULP Are Moot.

The very allegations that form the basis of the present ULP have already been litigated. As detailed above, the Counsel for the General Counsel raised these issues in its Petition to Revoke the Foster Subpoena and, following Oxarc's Opposition, the ALJ made a determination. *See* Exhibits B, C, and E. Pursuant to the July 28 ALJ Order, document request numbers 7 through 10 have been revoked as it pertains to documents and communications between Foster and other employees, as well as documents and communications between Foster and the Union and/or General Counsel. *See* Exhibit E. Because the ALJ declined to speak to Counsel for the General Counsel's argument that document request numbers 7, 8, and 10 were facial violations of the Act, it is necessarily assumed that such argument was disregarded. Telling for this matter is the fact that the ALJ did not revoke document requests 7-10 in their entirety. On the contrary, the ALJ specifically noted that these requests do, in fact, request lawful and discoverable information. For example, the ALJ held that certain aspects of Foster's communications with the Union are not protected, such as date and time of calls and communications. *See* Exhibit E at p. 4-5. Further, the ALJ held that the requests lawfully request communications between Foster and third parties other than the union and Oxarc employees. *Id.* In short, the ALJ found that these requests all include discoverable information, and to the extent they seek information outside the lawful scope, they are revoked. Surely the ALJ would not have denied, in part, the Petition to Revoke if Respondent was acting unlawfully. Accordingly, the ULP is remedied.

Moreover, it bears mention that the Union, though aware of the Counsel to the General Counsel's Petition to Revoke, initiated the present ULP without any attempt to reconcile with Oxarc and/or await Oxarc's Opposition to Petition to Revoke. As we are less than one week before the Trial, the Union's motives are transparent.

For these reasons, the Board should adopt the July 28 ALJ Order, and, in doing so, find that the present ULP is moot and dismiss the Charge in its entirety.

B. The ULP Should Nonetheless be Dismissed on the Merits Because the Document Requests do not Infringe on Fosters' Section 7 Rights.

Should the Board not find that the ULP is moot, the Charge should nonetheless be dismissed as document request numbers 7 through 10 of the Foster Subpoena do not infringe on Foster's Section 7 rights.

In *NLRB v. Robbins Tire & Rubber Co.*, the Supreme Court upheld the Board's policy preventing parties in unfair labor practice proceeding from obtaining, in advance of the hearing, copies of statements collected during the investigation from potential witnesses. 437 U.S. 214 (1978). In so doing, the Court emphasized that a holding to the contrary would "disturb the existing balance of relations in unfair labor practice proceedings, a delicate balance that Congress has deliberately sought to preserve and that the Board maintains is essential to the effective

enforcement of the NLRA." *Id.* at 236. Specifically, the Court emphasized that providing witness statements in advance of the hearing would create the obvious risk of employers intimidating employee witnesses prior to trial "in an effort to make them change their testimony or not testify at all." *Id.*

To accommodate this concern, the Board's "Jencks[3]" rule provides that a witness' pretrial statement will be furnished to a litigant only after counsel for the General Counsel has called the witness on direct, to be used in cross-examination. NLRB Rules and Regulations, § 102.118(b)(1); NLRB Division of Judges Bench Book, § 8-500. That rule is founded upon the need "to forestall such intimidation and harassment as would otherwise be possible because of the leverage inherent in the employer-employee relationship." *NLRB v. Lizdale Knitting Mills, Inc.*, 523 F.2d 978, 980 (2d Cir. 1975).

Robbins is inapplicable to the present matter. First, Document request numbers 7 through 10 of the Subpoena do not request Fosters' witness statement(s). In fact, instruction number 12 in Respondent's statement specifically provides otherwise:

> Through this subpoena, Respondent is not seeking the production of any affidavit prepared by the NLRB in the course of its investigation of this matter. To the extent you object to the production of documents and/or recordings requested by this subpoena on the grounds that compliance with the subpoena would require the release or disclosure of documents and/or recordings that disclose the identities of employees or identify other alleged confidential or protected information, you are requested to produce all responsive documents and/or recordings for an in-camera inspection by the Administrative Law Judge for determination of whether claims involving the disclosure of employee identities or confidential or protected information are valid, or whether such information can be redacted so that the applicable documents and/or recordings can be produced to Respondent.

Exhibit A.

Respondent's deliberate inclusion of this instruction makes clear that, contrary to the Union's assertions, it understands the scope of a proper subpoena and is in no way including such document requests to unlawfully usurp Foster's protections under the National Labor Relations Act ("NLRA"). This was also confirmed by the ALJ in its July 28 ALJ Order on the Petition to Revoke. *See* Exhibit E at p. 4. Furthermore, for avoidance of any doubt, Respondent made clear in its Opposition to the Petition to Revoke that it was *not* seeking confidential communications. In other words, Respondent clarified that it was not seeking any documents outside lawful bounds. This confirmation, along with the subpoena's instructions, thwart the ULP.

Second, even if these Document Requests envision the production of a witness statement made by Foster, there is no risk of intimidation, harassment, or retaliation, as there is indeed no

[3] For the origin of the rule, *see Jencks v. U.S.*, 353 U.S. 657 (1957).

employer-employee relationship to leverage. Foster is a ***former*** employee of Oxarc. Therefore, the Board's *Jencks* rule and the caselaw on which it is based are wholly inapplicable here.

To the contrary, the court has held that where subpoenaed communications between a union and an employee witness for the union are relevant to the employer's case and to the credibility of the employee, the Board, or, where applicable, the ALJ should not revoke the subpoena in its entirety. Rather, the Board or ALJ should require production of responsive information that would not infringe on any confidentiality interests under *National Telephone,* 319 NLRB 420 (1995) (such as the mere date and time of calls between the union and the employee), and should conduct an *in camera* review to determine if other responsive information that might infringe on employee confidentiality interests outweighs the employer's interests or to narrow the scope of the subpoena. *See Ozark Automotive Distributors, Inc. v. NLRB*, 779 F.3d 576 (D.C. Cir. 2015), denying enf. and remanding 357 NLRB 1041 (2011); *see also Veritas Health Services, Inc. v. NLRB*, 895 F.3d 69, 81 (D.C. Cir. 2018) (quashing the subpoena was an abuse of discretion "because the missing evidence prejudiced a critical element of that case").

Document request numbers 7, 8, 9, and 10 are relevant to the issues being litigated at the Trial – i.e. whether or not Respondent violated the Act by unlawfully terminating Foster's employment. Even if, however, such requests infringed on confidentiality interests of Foster, *National Telephone* directs the ALJ or Board to engage in an in-camera inspection to determine which documents would be provided. The foregoing would necessarily address any Section 7 employee confidentiality interests potentially implicated by the document requests.

If the Union had taken the time to read Respondent's Opposition, it would have necessarily been briefed on the foregoing analysis, and, would have recognized Respondent's amenability to an in-camera inspection of the documents to determine which documents would be provided. Rather, the Union took the opportunity to, instead, file the present ULP without (1) waiting for a disposition on the Petition to Revoke and (2) without conferring with Respondent to find a middle-ground.

Respondent has not committed a violation of Section 8(a)(1) of the Act by its ***mere request*** for document request numbers 7, 8, 9, and 10 of the Foster Subpoena and requests that the Union's ULP be dismissed, in its entirety.

III. CONCLUSION

As a threshold matter, the Board must decide whether the issues within this ULP are moot. Oxarc submits that, as detailed above, the ALJ's disposition has remedied any ***alleged*** wrongdoing alleged by the Union. Alternatively, Oxarc respectfully requests that the Region forgo further

investigation and dismiss the Charge in its entirety. Should you require further information, please contact the undersigned.

Respectfully,

Rick Grimaldi, Esq.
Samantha Sherwood Bononno, Esq.
Kelsey E. Beerer, Esq.

Attachments

Exhibit A

Fisher Phillips

fisherphillips.com

Philadelphia
Two Logan Square, 12th Floor
100 N. 18th Street
Philadelphia, PA 19103

(610) 230-2150 Tel
(610) 230-2151 Fax

Writer's Direct Dial:
610-230-2172

Writer's E-mail:
sbononno@fisherphillips.com

July 15, 2020

VIA CERTIFIED MAIL

Jared Foster
6219 Wrigley Drive
Pasco, WA 99301

Re: ***Oxarc, Inc.***
Cases 19-CA-230472, et al.

Dear Mr. Foster:

As you know, this firm represents Oxarc, Inc. in connection with the above-referenced matter. Enclosed please find a subpoena and a subpoena duces tecum requiring you to appear and testify and to produce documents at the hearing to be held on August 3, 2020, along with a check representing witness fees. The witness fees include a $40.00 base rate.[1]

The hearing in the above-captioned matter is scheduled to occur via the videoconferencing platform, Zoom. The parties are expected to receive further information as to the procedures and protocols to be employed with respect to subpoenas at a later time and will supplement this correspondence, if necessary.

With respect to the Subpoena Duces Tecum, given the present circumstances, we will accept the documents via mail or e-mail on or before August 3, 2020 at the above address and/or e-mail address. Thank you for your anticipated cooperation.

Sincerely,

Samantha Sherwood Bononno, Esquire
For FISHER & PHILLIPS LLP

SSB:di
Enclosures

1 Should you incur any additional costs, please advise us as soon as possible in order to be reimbursed.

cc: Adam Morrison, Esquire (via email); Matthew Harris, Esquire (via email); and Roger Grimaldi, Esquire (via email)

FORM NLRB-32

SUBPOENA

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

To Jared Foster

6219 Wrigley Drive, Pasco, WA 99301

As requested by Samantha Sherwood Bononno, Esq. as counsel for Oxarc, Inc.

whose address is Two Logan Square, 12th Floor, 100 N. 18th St., Philadelphia, PA 19103
(Street) (City) (State) (ZIP)

YOU ARE HEREBY REQUIRED AND DIRECTED TO APPEAR BEFORE An Administrative Law Judge

of the National Labor Relations Board

at National Labor Relations Board

in the City of via Zoom video conference, the details of which will be provided.

on Monday, August 3, 2020, beginning at 9:00 a.m. or any adjourned

or rescheduled date to testify in Oxarc, Inc.
Cases 19-CA-230472, et al.
(Case Name and Number)

If you do not intend to comply with the subpoena, within 5 days (excluding intermediate Saturdays, Sundays, and holidays) after the date the subpoena is received, you must petition in writing to revoke the subpoena. Unless filed through the Board's E-Filing system, the petition to revoke must be received on or before the official closing time of the receiving office on the last day for filing. If filed through the Board's E-Filing system, it may be filed up to 11:59 pm in the local time zone of the receiving office on the last day for filing. Prior to a hearing, the petition to revoke should be filed with the Regional Director; during a hearing, it should be filed with the Hearing Officer or Administrative Law Judge conducting the hearing. See Board's Rules and Regulations, 29 C.F.R Section 102.31(b) (unfair labor practice proceedings) and/or 29 C.F.R. Section 102.66(c) (representation proceedings) and 29 C.F.R Section 102.111(a)(1) and 102.111(b)(3) (time computation). Failure to follow these rules may result in the loss of any ability to raise objections to the subpoena in court.

A-1-19NVXSV

Under the seal of the National Labor Relations Board, and by direction of the Board, this Subpoena is

Issued at Pasco, Washington

Dated: July 15, 2020

John Ring, Chairman

NOTICE TO WITNESS. Witness fees for attendance, subsistence, and mileage under this subpoena are payable by the party at whose request the witness is subpoenaed. A witness appearing at the request of the General Counsel of the National Labor Relations Board shall submit this subpoena with the voucher when claiming reimbursement.

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and/or unfair labor practice proceedings and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is mandatory in that failure to supply the information may cause the NLRB to seek enforcement of the subpoena in federal court.

Case 19-CA-230472

A-1-19NVXSV

RETURN OF SERVICE

I certify that, being a person over 18 years of age, I duly served a copy of this subpoena

(Check method used.)

- ☐ by person
- ☑ by certified mail
- ☐ by registered mail
- ☐ by telegraph
- ☐ by leaving copy at principal office or place of business at

_____

_____

_____

on the named person on

July 15, 2020

(Month, day, and year)

Danielle Innocenzo

(Name of person making service)

Legal Assistant

(Official title, if any)

CERTIFICATION OF SERVICE

I certify that named person was in attendance as a witness at

_____

on

(Month, day or days, and year)

_____

(Name of person certifying)

_____

(Official title)

FORM NLRB-31

SUBPOENA DUCES TECUM

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

To Jared Foster

6219 Wrigley Drive, Pasco, WA 99301

As requested by Samantha Sherwood Bononno, Esq. as counsel for Oxarc, Inc.

whose address is Two Logan Square, 12th Floor, 100 N. 18th St., Philadelphia, PA 19103
(Street) (City) (State) (ZIP)

YOU ARE HEREBY REQUIRED AND DIRECTED TO APPEAR BEFORE An Administrative Law Judge

of the National Labor Relations Board

at

in the City of via Zoom video conference, the details of which will be provided,

on Monday, August 3, 2020, beginning at 9:00 a.m. or any adjourned

or rescheduled date to testify in Oxarc, Inc.
Cases 19-CA-230472, et al.
(Case Name and Number)

And you are hereby required to bring with you and produce at said time and place the following books, records, correspondence, and documents via email in light of the Zoom nature of the hearing to sbononno@fisherphillips.com.

SEE ATTACHMENT

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B-1-19NVZAR

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on the named person on

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Danielle Innocenzo

(Name of person making service)

Legal Assistant

(Official title, if any)

CERTIFICATION OF SERVICE

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_____

on

(Month, day or days, and year)

_____

(Name of person certifying)

_____

(Official title)

ATTACHMENT TO SUBPOENA DUCES TECUM

Re: 19-CA-230472, et al.

DEFINITIONS AND INSTRUCTIONS

1) The word "Document" or "Documents" means, without limitation, the following items, whether printed or recorded or reproduced by any other mechanical or electronic process, or written or produced by hand, or any existing printed, typewritten, handwritten or otherwise recorded material of whatever kind and/or character, including, but not limited to: agreements, communications, correspondence, telegrams, letters, memoranda, facsimile transmissions, minutes, notes of any character, diaries, calendars, statements, affidavits, photographs, microfilm or microfiche, audio and/or video tapes, statistics, pamphlets, newsletters, press releases, bulletins, transcripts, summaries or records of telephone conversations, summaries or records of personal conversations or interviews, conferences, transcripts or summaries or reports of investigations and/or negotiations, drafts, internal or inter-office memoranda or correspondence, lists, data contained in computers, computer printouts, computer discs and/or files and all data contained therein, e-mail, any marginal or "post-it" or "sticky pad" comments appearing on or with documents, and all other writings, figures or symbols of any kind, including but not limited to carbon, photographic or other duplicative copies of any such material in the possession of, control of or available to the subpoenaed party, or any agent, representative, or other persons acting in cooperation with, in concert with, or on behalf of said subpoenaed party.

2) "Communications" means any correspondence, conversation, dialogue, discussion, interview, consultation, agreement, understanding between or among two or more persons, notice, transfer or exchange of information, expression of intent, inquiry or other direction, conveyance or receipt of facts or messages, by oral, written, face-to-face, electronic, telephonic means, or any other medium, including, but not limited to, emails and text messages.

3) The word "person" or "persons" means natural persons, corporation(s), partnership(s), sole proprietorship(s), associations(s), governmental entity or any other kind of entity.

4) "Respondent" means OXARC, INC., including any representatives with authority to act on its behalf.

5) "Union" means INTERNATIONAL BROTHERHOOD OF TEAMSTERS and any local charter, including any representatives with authority to act on their behalf.

6) "You," "your," and "FOSTER" means JARED FOSTER, including any representatives with authority to act on his behalf.

7) Unless otherwise defined herein, the term "Complaint" refers to the Third Consolidated Complaint and Notice of Hearing issued by the Regional Director for Region 19 on December 9, 2019, in connection with the above-referenced matter.

8) As to any documents not produced in compliance with this subpoena on any ground or if any document requested was, through inadvertence or otherwise destroyed or is no longer in your possession, please state:

a. the author;
b. the recipient;
c. the name of each person to whom the original or a copy was sent;
d. the date of the document;
e. the subject matter of the document; and
f. the circumstances under which the document was destroyed, withheld or is no longer in your possession.

9) This request is continuing in character and if additional responsive documents come to your attention following the date of production, such documents must be promptly produced.

10) This request seeks production of all documents described, including all drafts and non-identical or distribution copies and contemplates production of responsive documents in their entirety, without abbreviation, redaction, deletion or expurgation.

11) All documents produced pursuant to this subpoena are to be organized by what subpoena paragraph each document or documents are responsive, and labels referring to that subpoena paragraph are to be affixed to each document or set of documents.

12) Through this subpoena, Respondent is not seeking the production of any affidavit prepared by the NLRB in the course of its investigation of this matter. To the extent you object to the production of documents and/or recordings requested by this subpoena on the grounds that compliance with the subpoena would require the release or disclosure of documents and/or recordings that disclose the identities of employees or identify other alleged confidential or protected information, you are requested to produce all responsive documents and/or recordings for an in-camera inspection by the Administrative Law Judge for determination of whether claims involving the disclosure of employee identities or confidential or protected information are valid, or whether such information can be redacted so that the applicable documents and/or recordings can be produced to Respondent.

DOCUMENTS SUBJECT TO SUBPOENA

1. Any and all Documents and/or Communications that reflect, relate to, or refer to any discipline or corrective action you received by Respondent during your employment with Respondent.

2. Any and all Documents and/or Communications that reflect, relate to, or refer to the termination of your employment with Respondent.

3. Any and all Documents and/or Communications that reflect, relate to, or refer to any discipline you received while employed by Respondent, including verbal warnings, written warnings or any discussions of performance or work rule violations.

4. Any and all Documents and/or Communications that reflect, relate to, or refer to any and all employment and/or offers of employment secured by you from June 14, 2018 to present.

5. Your tax returns, both state and federal, for the tax and/or calendar years 2018 through the present.

6. Any and all Documents that reflect, relate to, or refer to income you have received from June 14, 2018 to the present, including, but not limited to, any sums received from unemployment compensation, disability benefits, social security, workers' compensation, or other source(s).

7. Any and all Documents and/or Communications that reflect, relate to, or refer to any alleged union and/or protected concerted activities that you engaged in during your employment with Respondent.

8. Any and all Documents that relate to any Communications, oral or written, taken or received by you, of a potential witness or person with knowledge of facts pertinent to this Complaint.

9. Any and all Documents and/or Communications that reflect, relate to, or refer to the Respondent's alleged violation(s) of the National Labor Relations Act with respect to you.

10. Any and all Communications between you and the Union concerning the allegations contained in the Complaint.

11. Any and all e-mails or text messages that reflect, relate to, or refer to your claims at issue in this Complaint.

12. Any and all Documents which support, rebut, or otherwise concern the allegations contained in the Complaint.

ORIGINAL CHECK HAS A COLORED BACKGROUND PRINTED ON CHEMICAL REACTIVE PAPER - SEE BACK FOR DETAILS

NO. 002571

Fisher & Phillips
150 N. Radnor Chester Road
Suite C300
Radnor, PA 19087

Form 515-BL

DATE 07-15-2020

AMOUNT
$******40.00**

PAY FORTY AND 00/100 DOLLARS
TO THE ORDER OF:
Jared Foster
6219 Wrigley Drive
Pasco, WA 99301

Authorized Signature

⑈00002571⑈ ⑆061000104⑆ 10000584273 69⑈

Fisher & Phillips

Request Number: 464129
Check Number: **NO. 002571**
Check Date: Jul 15/20

Payee: Jared Foster

Invoice #	Inv. Date	G/L Acct	Client	Matter	Narrative	Amount	Inv. Total
20201507FOSTER 15/20			47568	0013		40.00	40.00
					Invoice Totals:	$40.00	$40.00

Fisher & Phillips

Request Number: 464129
Check Number: 2571 **NO. 002571**
Check Date: 07-15-2020

Payee: Jared Foster

Invoice #	Inv. Date	G/L Acct	Client	Matter	Narrative	Amount	Inv. Total
20201507FOSTER 15/20			47568	0013		40.00	40.00
					Invoice Totals:	$40.00	$40.00

Exhibit B

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

OXARC, INC.	
and	Cases 19-CA-230472
TEAMSTERS LOCAL 839	
and	19-CA-237336 19-CA-237499 19-CA-238503
TEAMSTERS LOCAL 690	
and	19-CA-248391
INTERNATIONAL BROTHERHOOD OF TEAMSTERS	
and	19-CA-232728
JARED FOSTER, an Individual	

COUNSEL FOR THE GENERAL COUNSEL'S PETITION TO REVOKE THE SUBPOENA DUCES TECUM ISSUED TO CHARGING PARTY JARED FOSTER

Pursuant to Rule 102.31(b) of the Board's Rules and Regulations and Statements of Procedure (the "Board's Rules and Regulations"), Counsel for the General Counsel respectfully requests that Oxarc, Inc.'s ("Respondent") subpoena *duces tecum* B-1-19NVZAR (the "Subpoena"), issued to individual Charging Party Jared Foster ("Foster"), attached hereto as Exhibit A, be revoked in its entirety. Aside from the Subpoena being another naked attempt by Respondent to obtain impermissible pretrial discovery, it also seeks documents that are neither relevant to these proceedings nor that Respondent is

legally entitled to. In fact, as discussed below, Respondent reaches so far beyond what it is legally entitled to in seeking the § 7 activities and communications between Foster and his coworkers and his union that Respondent may actually be committing additional violations of the National Labor Relations Act (the "Act"), 29 U.S.C. 151 *et seq*.

A. Items #1-3 of the Subpoena Seek Respondent's Own Documents from Foster

In Items #1-3 of the Subpoena, Respondent seeks any discipline issued *by Respondent* to Foster, including his termination. To be clear, these are Respondent's *own* documents that Respondent created and then issued to Foster, and that Respondent is now requesting *from* Foster. This is ludicrous – they are documents under Respondent's control.

While it is unknown if Foster still even possess these documents or what Respondent's motivations are for requesting this information, clearly Respondent, not Foster, is in the best position to collect and obtain its own documents. Accordingly, Foster should not be compelled to provide copies of Respondent's own documents back to them. Nor should Foster bear the risk of a possible adverse inference being drawn for a lack of compliance with the Subpoena given Respondent is in control of the documents sought. *See CPS Chem. Co*., 324 NLRB 1018, 1019 (1997), *enf'd*. 160 F.3d 150 (3d Cir. 1998) (absence of documents did not prevent the Respondent from proving any relevant part of its case).

Even if this request were not so ill-founded, it is inexplicable given that Respondent admitted in its Answer to the Consolidated Complaint that it disciplined and discharged Foster on June 14, 2018. Thus, at least a portion of these Items seek documents for an issue that is not even in dispute in this matter. As the Act and Board case law clearly

hold, information sought through a subpoena under § 11(1) of the Act must be reasonably relevant to a matter in dispute in the proceedings. *See* 29 U.S.C. § 161(1) (petitions to revoke should be granted when information to be produced "does not relate to any matter . . . in question in [the] proceedings"); *CNN America, Inc*., 353 NLRB 891 (2009) (subpoenaed items must be reasonably relevant to the disputed matters under litigation); *Perdue Farms, Inc. v. NLRB,* 144 F.3d 830, 834 (D.C. Cir. 1998). Accordingly, Items # 1–3 of the Subpoena should be quashed.

B. Items #4-6 Are Not Relevant to the Merit Phase of This Proceeding

Respondent's requests in Items #4-6 seek various post-discharge financial and employment information from Foster related to Foster's potential backpay, including his mitigation efforts. It does not, however, seek any information concerning whether Respondent violated the Act as alleged in the Complaint, which is the only issue in this proceeding at this time. This is not a compliance proceeding after which Respondent has been found to be in violation of the Act as alleged.

The Board traditionally bifurcates complaint and compliance process.[1] *See, e.g., Great Lakes Chem. Corp*., 323 NLRB 749 (1997). The first stage, often called the "liability" or "merit" phase, only contains litigation on whether a respondent violated the Act as alleged in the complaint. *See* § 102.15 of the Board's Rules and Regulations (the initial complaint shall only include jurisdictional facts and "a concise description of the acts which are claimed to constitute unfair labor practices"). If the Board finds a violation, then

[1] The rare exception is, of course, when the Regional Director, pursuant to his authority in § 102.54(b) of the Board's Rules and Regulations, issues a combined complaint and compliance speculation, which has not been done in the instant matter.

the matter enters a second compliance stage. *See* § 102.54 of the Board's Rules and Regulations. There is no compliance specification as part of the instant complaint.

The information sought by Respondent in Items #4-6 of the Subpoena only relates to the potential compliance stage and does not relate, in any way, to the matters being litigated at this stage of the proceedings. As such, Items #4-6 of Respondent's Subpoena are clearly not relevant to a matter in dispute here and should be revoked. *See King Soopers, Inc*., 364 NLRB No. 93, slip op. at 8, 22 (2016) (granting the General Counsel's petition to revoke the respondent employer's subpoena duces tecum to the individual charging party seeking documentation of her search for work efforts and expenses, as the subpoenaed information was irrelevant at the merits stage of the proceeding), *vacated in part on other grounds* 859 F.3d 23 (D.C. Cir. 2017).

C. Items #7 and #10 Are Inappropriate and Likely Violate § 8(a)(1) of the Act

Item #7 seeks "all documents and communications . . . of [Foster's] alleged union and/or protected concerted activities." Likewise, Item #10 seeks "all documents and communications between Foster and his Union" concerning his allegation that Respondent discharged him. Respondent unsuccessfully sought this information from the General Counsel through its failed Motion for a Bill of Particulars ("Motion"), attempting to compel the General Counsel to identify and disclose the specific § 7 activity engaged in by Foster, prior to testimony in the upcoming hearing. In his July 13, 2020 Order denying the Motion, the Administrative Law Judge correctly ruled that the Complaint, as alleged, clearly complies with the Board's Rules and Regulations and that the disclosure of an alleged discriminatee's § 7 activities, prior the presentation of such evidence at the hearing, is not permitted. *See NLRB v. Robbins Tire & Rubber Co*., 437

U.S. 214 (1978) (upholding the Board's longstanding prohibition against pre-disclosure of employees' § 7 activities, prior to the testimony at hearing, because of the very real dangers posed by interference by a respondent, as in the instant case, who has been charged with violating employees' § 7 rights). Respondent, through its Subpoena, is now attempting to make an end run around that ruling by seeking the same information from an unrepresented individual charging party and alleged discriminatee. Not only is this reprehensible, but it is a wholly inappropriate and unlawful use of the subpoena process.

Respondent's subpoena has a primary and unlawful objective by attempting to compel Foster's and other employees' protected, concerted activities through Subpoena Item #7, and Foster's protected communications with the Union through Subpoena Item #10. "The Board zealously seeks to protect the confidentiality interests of employees because of the possibility of intimidation by employers who obtain the identity of employees engaged in organizing." *Wright Elec., Inc.*, 327 NLRB 1194, 1195 (1999), *enf'd.* 200 F.3d 1162 (8th Cir. 2000). Indeed, the Board takes this protection so seriously that an employer who seeks to compel an individual through subpoena to identity his and other employees' § 7 activities independently violates § 8(a)(1) of the Act. *See, e.g., Chino Valley Med. Ctr.*, 362 NLRB 283, 283, n.1 (2015) (8(a)(1) violation in issuing subpoenas duces tecum to employees attempting to compel them to disclose § 7 activities and communications), *enfd. sub nom*. *United Nurses Ass'n of Cal. v. NLRB***,** 871 F.3d 767 (9th Cir. 2017); *Guess?, Inc*., 339 NLRB 432 (2003) (8(a)(1) violated during deposition in a workers' compensation case by asking employee to reveal the identities of those who attended union meetings); *Wright Elec., Inc*., 327 NLRB at 1194 (8(a)(1) by

subpoenaing employee authorization cards in a state court lawsuit), *enf'd*. 200 F.3d. 1162, 1167 (8th Cir. 2000); *National Tel. Directory Corp.*, 319 NLRB 420, 421 (1995).

Moreover, any compelled response to Item #7 in the Subpoena would necessarily also include Foster's affidavit provided to the Board during the investigation of his charge. This is not permissible and would constitute a further violation of § 8(a)(1) of the Act. *See, e.g., Santa Barbara News-Press*, 361 NLRB 903, 903, n.1 (2014). Even if it didn't, under § 102.118(b)(1) of the Board's Rules and Regulations, the production of witness statements is *only* allowed *after the witnesses have testified* in a Board proceeding about subjects covered by such statements and a timely request for such statements is made for the purpose of cross-examination. *H.B. Zachry Co.*, 310 NLRB 1037, 1038 (1993).

Since it is well settled that a subpoena that has an unlawful objective (*i.e*., seeking to compel disclosure of an employees' § 7 activities or communications, as discussed above), is itself unlawful, the Subpoena must be quashed. *See Santa Barbara News-Press,* 358 NLRB 1539, 1539-40 (2012), *reaffirmed* 362 NLRB 252 (2015) (after *de novo* review in light of *NLRB v. Noel Canning*, 572 U.S. 513 (2014), Board reaffirmed prior decision); *Dilling Mech. Contractors, Inc.,* 357 NLRB 544, 546 (2011).

D. Items #8-9 and #11-12 Are Impermissible Attempts at Pre-Trial Discovery and Are Privileged by the Work Product and/or Attorney-Client Privileges

By these Items in the Subpoena, Respondent is once again requesting the General Counsel's evidence in support of the Complaint, this time by requesting it from Foster. Item #8 of the Subpoena seeks documents and communications with any "potential

witness or person with knowledge of facts pertinent to this Complaint."[2] Similarly, Item #9 seeks documents and communications concerning Respondent's "alleged violation(s) of the [Act] with respect to" Foster. Likewise, Item #11 seeks "all e-mails and text messages that reflect, relate to, or refer to [Foster's] claims at issue in the Complaint." And, in Item #12, Respondent seeks "documents, which support, rebut, or otherwise concern the allegations in the Complaint."

These four Subpoena Items, in sum, essentially seek from Foster all of the evidence in support of the Complaint allegations in advance of trial, including those documents prepared and submitted as part of the Board's investigatory process of his charge. This is, plainly and simply, impermissible pre-trial discovery. *See, e.g., Offshore Mariners United*, 338 NLRB 745, 746 (2002) (it is well established that the Board, with court approval, does not allow for pretrial discovery); *David R. Webb Co*., 311 NLRB 1135 (1993) (due to the unique nature of its jurisdiction, the Board does not permit pretrial discovery because of the very possibility of retaliation and further discrimination by a responded accused of violating employees' § 7 rights); *Mid-Atlantic Rest. Grp. LLC v. NLRB*, 722 Fed. Appx. 284, 287, n. 2 (3rd Cir. Jan. 25, 2018).

Not only are items #8-9 and #11-12 impermissible attempts at pretrial discovery, but many, if not all, of the documents that would potentially be responsive to these Subpoena Items are also protected as work-product privilege. To the extent such documents reflect the written work product, thought processes, and conversations of Board agents, they are protected from disclosure. *See Hickman v. Taylor*, 329 U.S. 495

[2] In addition to arguments made in this section, Respondent also potentially violates § 8(a)(1) of the Act with Item #8 because, as discussed above, it compels production of communications between Foster and other individuals that constitutes § 7-protected activity. *See Chino Valley Med. Ctr.*, 362 NLRB at 283.

(1947); Fed. R. Civ. P. 26(b)(3). In *Hickman*, the United States Supreme Court explained that the work-product protection encompasses "interviews, statements, memoranda, correspondence, briefs, mental impressions, [and] personal beliefs." 329 U.S. at 511. Moreover, the protection afforded work product under Fed. R. Civ. P. 26(b)(3) extends to material prepared by agents of the attorney as well as those prepared by the attorney himself, and continues beyond the litigation for which the documents at issue were prepared. *See U.S. v. Nobles*, 422 U.S. 225, 238-39 (1975); *FTC v. Grolier*, 462 U.S. 19 (1983). Therefore, the subpoenaed work product of the Board, even if requested through an individual charging party, is shielded from compelled production through F.R.C.P. 26(b)(3)'s directive that "the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney."

The Board also extends such protection from disclosure of other types of documents prepared and submitted as part of the Board's investigatory process. In *Kaiser Aluminum,* 339 NLRB 829 (2003), for example, the Board sustained the revocation of a subpoena calling for the production of a charging party's position statements because the position statements constituted "work product" within the meaning of Rule 26(b)(3) of the Federal Rules of Civil Procedure. Other correspondence with Board agents and other documentation or communications with the Board would likewise be privileged from disclosure as "work product" insofar as such documents necessarily would have been prepared by the Union or by Board agents during the investigation of the unfair labor practice charge and in anticipation of litigation and would reveal the mental impressions, conclusions, opinions, or legal theories of the Union and the General Counsel. Fed. R.

of Civ. P. 26(b)(3); *Hickman v. Taylor*, 329 U.S. at 495; *Central Tel. Co.*, 343 NLRB 987 (2004). Accordingly, Subpoena Items #8-9 and #11-12 should be quashed.

E. Conclusion

For the reasons set forth above and based upon well settled Board law, Counsel for the General Counsel respectfully requests that the Subpoena issued to individual Charging Party Jared Foster, in its entirety, be quashed.

Respectfully submitted this 21st day of July, 2020.

/s/ Sarah M. McBride
/s/ Adam D. Morrison
Sarah M. McBride and Adam D. Morrison
Counsel for General Counsel
National Labor Relations Board, Region 19
Jackson Federal Building
915 Second Avenue, 29th Floor
Seattle, WA 98174
Sarah.mcbride@nlrb.gov
Adam.morrison@nlrb.gov
(206) 220-6300 (phone)
(206) 220-6305 (fax)

FORM NLRB-31

SUBPOENA DUCES TECUM

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

To Jared Foster

6219 Wrigley Drive, Pasco, WA 99301

As requested by Samantha Sherwood Bononno, Esq. as counsel for Oxarc, Inc.

whose address is Two Logan Square, 12th Floor, 100 N. 18th St., Philadelphia, PA 19103
(Street) (City) (State) (ZIP)

YOU ARE HEREBY REQUIRED AND DIRECTED TO APPEAR BEFORE An Administrative Law Judge

of the National Labor Relations Board

at

in the City of via Zoom video conference, the details of which will be provided,

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or rescheduled date to testify in Oxarc, Inc. Cases 19-CA-230472, et al.
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NOTICE TO WITNESS. Witness fees for attendance, subsistence, and mileage under this subpoena are payable by the party at whose request the witness is subpoenaed. A witness appearing at the request of the General Counsel of the National Labor Relations Board shall submit this subpoena with the voucher when claiming reimbursement.

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and/or unfair labor practice proceedings and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is mandatory in that failure to supply the information may cause the NLRB to seek enforcement of the subpoena in federal court.

Exhibit A

Case 19-CA-230472

B-1-19NVZAR

RETURN OF SERVICE

I certify that, being a person over 18 years of age, I duly served a copy of this subpoena

(Check method used.)

- ☐ by person
- ☑ by certified mail
- ☐ by registered mail
- ☐ by telegraph
- ☐ by leaving copy at principal office or place of business at

_____

_____

_____

on the named person on

July 15, 2020

(Month, day, and year)

Danielle Innocenzo

(Name of person making service)

Legal Assistant

(Official title, if any)

CERTIFICATION OF SERVICE

I certify that named person was in attendance as a witness at

_____

on

(Month, day or days, and year)

_____

(Name of person certifying)

_____

(Official title)

ATTACHMENT TO SUBPOENA DUCES TECUM

Re: 19-CA-230472, et al.

DEFINITIONS AND INSTRUCTIONS

1) The word "Document" or "Documents" means, without limitation, the following items, whether printed or recorded or reproduced by any other mechanical or electronic process, or written or produced by hand, or any existing printed, typewritten, handwritten or otherwise recorded material of whatever kind and/or character, including, but not limited to: agreements, communications, correspondence, telegrams, letters, memoranda, facsimile transmissions, minutes, notes of any character, diaries, calendars, statements, affidavits, photographs, microfilm or microfiche, audio and/or video tapes, statistics, pamphlets, newsletters, press releases, bulletins, transcripts, summaries or records of telephone conversations, summaries or records of personal conversations or interviews, conferences, transcripts or summaries or reports of investigations and/or negotiations, drafts, internal or inter-office memoranda or correspondence, lists, data contained in computers, computer printouts, computer discs and/or files and all data contained therein, e-mail, any marginal or "post-it" or "sticky pad" comments appearing on or with documents, and all other writings, figures or symbols of any kind, including but not limited to carbon, photographic or other duplicative copies of any such material in the possession of, control of or available to the subpoenaed party, or any agent, representative, or other persons acting in cooperation with, in concert with, or on behalf of said subpoenaed party.

2) "Communications" means any correspondence, conversation, dialogue, discussion, interview, consultation, agreement, understanding between or among two or more persons, notice, transfer or exchange of information, expression of intent, inquiry or other direction, conveyance or receipt of facts or messages, by oral, written, face-to-face, electronic, telephonic means, or any other medium, including, but not limited to, emails and text messages.

3) The word "person" or "persons" means natural persons, corporation(s), partnership(s), sole proprietorship(s), associations(s), governmental entity or any other kind of entity.

4) "Respondent" means OXARC, INC., including any representatives with authority to act on its behalf.

5) "Union" means INTERNATIONAL BROTHERHOOD OF TEAMSTERS and any local charter, including any representatives with authority to act on their behalf.

6) "You," "your," and "FOSTER" means JARED FOSTER, including any representatives with authority to act on his behalf.

7) Unless otherwise defined herein, the term "Complaint" refers to the Third Consolidated Complaint and Notice of Hearing issued by the Regional Director for Region 19 on December 9, 2019, in connection with the above-referenced matter.

8) As to any documents not produced in compliance with this subpoena on any ground or if any document requested was, through inadvertence or otherwise destroyed or is no longer in your possession, please state:

a. the author;
b. the recipient;
c. the name of each person to whom the original or a copy was sent;
d. the date of the document;
e. the subject matter of the document; and
f. the circumstances under which the document was destroyed, withheld or is no longer in your possession.

9) This request is continuing in character and if additional responsive documents come to your attention following the date of production, such documents must be promptly produced.

10) This request seeks production of all documents described, including all drafts and non-identical or distribution copies and contemplates production of responsive documents in their entirety, without abbreviation, redaction, deletion or expurgation.

11) All documents produced pursuant to this subpoena are to be organized by what subpoena paragraph each document or documents are responsive, and labels referring to that subpoena paragraph are to be affixed to each document or set of documents.

12) Through this subpoena, Respondent is not seeking the production of any affidavit prepared by the NLRB in the course of its investigation of this matter. To the extent you object to the production of documents and/or recordings requested by this subpoena on the grounds that compliance with the subpoena would require the release or disclosure of documents and/or recordings that disclose the identities of employees or identify other alleged confidential or protected information, you are requested to produce all responsive documents and/or recordings for an in-camera inspection by the Administrative Law Judge for determination of whether claims involving the disclosure of employee identities or confidential or protected information are valid, or whether such information can be redacted so that the applicable documents and/or recordings can be produced to Respondent.

DOCUMENTS SUBJECT TO SUBPOENA

1. Any and all Documents and/or Communications that reflect, relate to, or refer to any discipline or corrective action you received by Respondent during your employment with Respondent.

2. Any and all Documents and/or Communications that reflect, relate to, or refer to the termination of your employment with Respondent.

3. Any and all Documents and/or Communications that reflect, relate to, or refer to any discipline you received while employed by Respondent, including verbal warnings, written warnings or any discussions of performance or work rule violations.

4. Any and all Documents and/or Communications that reflect, relate to, or refer to any and all employment and/or offers of employment secured by you from June 14, 2018 to present.

5. Your tax returns, both state and federal, for the tax and/or calendar years 2018 through the present.

6. Any and all Documents that reflect, relate to, or refer to income you have received from June 14, 2018 to the present, including, but not limited to, any sums received from unemployment compensation, disability benefits, social security, workers' compensation, or other source(s).

7. Any and all Documents and/or Communications that reflect, relate to, or refer to any alleged union and/or protected concerted activities that you engaged in during your employment with Respondent.

8. Any and all Documents that relate to any Communications, oral or written, taken or received by you, of a potential witness or person with knowledge of facts pertinent to this Complaint.

9. Any and all Documents and/or Communications that reflect, relate to, or refer to the Respondent's alleged violation(s) of the National Labor Relations Act with respect to you.

10. Any and all Communications between you and the Union concerning the allegations contained in the Complaint.

11. Any and all e-mails or text messages that reflect, relate to, or refer to your claims at issue in this Complaint.

12. Any and all Documents which support, rebut, or otherwise concern the allegations contained in the Complaint.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Counsel for the General Counsel's Petition to Revoke the Subpoena Duces Tecum Issued to Charging Party Jared Foster was served on the 21st day of July, 2020, on the following parties:

E-File:

The Honorable Gerald Etchingham
Associate Chief Judge
National Labor Relations Board
Division of Judges
901 Market St., Ste. 300
San Francisco, CA 94103

E-Mail:

Rick Grimaldi, Esq.
Samantha S. Bononno, Esq.
Fisher Phillips, LLP
Email: rgrimaldi@fisherphillips.com
Email: sbononno@fisherphillips.com

Matthew Harris, Staff Attorney
International Brotherhood of Teamsters
Email: mharris@teamster.org

Kristy Kennedy

Kristy Kennedy, Office Manager

Exhibit C

Innocenzo, Danielle

From: JudgesDivision@nlrb.gov <e-Service@service.nlrb.gov>
Sent: Friday, July 24, 2020 11:17 AM
To: Innocenzo, Danielle
Subject: RE: 19-CA-230472 - Response to a Petition to Revoke a Subpoena

Confirmation Number: 1046371450

You have successfully accomplished the steps for E-Filing document(s) with the NLRB SF - Division of Judges. This E-mail notes the official date and time of the receipt of your submission. Please save this E-mail for future reference.

Date Submitted:	Friday, July 24, 2020 11:14 AM (UTC-05:00) Eastern Time (US & Canada)
Case Name:	Oxarc, Inc.
Case Number:	19-CA-230472
Filing Party:	Charged Party / Respondent
Name:	Rick Grimaldi
Email:	rgrimaldi@fisherphillips.com
Address:	Two Logan Square, 12th Floor
	100 N. 18th Street
	Philadelphia PA 19103
Telephone:	(610) 230-2136
Attachments:	Response to a Petition to Revoke a Subpoena: Oxarc Inc. - Opposition to General Counsel's Petition to Revoke Subpoena B-1-19NVZAR (7-24-20).pdf

****
DO NOT REPLY TO THIS MESSAGE. THIS IS A POST-ONLY NOTIFICATION.
MESSAGES SENT DIRECTLY TO THE EMAIL ADDRESS LISTED ABOVE WILL NOT BE READ.
****

You have E-Filed your document(s) successfully. You will receive an E-Mail acknowledgement noting the official date and time we received your submission. Please save the E-Mail for future reference. You may wish to print this page for your records

Note: This confirms only that the document was filed. It does not constitute acceptance by the NLRB

Please be sure to make a note of this confirmation number.

Confirmation Number: 1046371450

Date Submitted: Friday, July 24, 2020 11:14 AM (UTC-05:00) Eastern Time (US & Canada)

Submitted E-File To Office: SF - Division of Judges

Case Number: 19-CA-230472

Case Name: Oxarc, Inc.

Filing Party: Charged Party / Respondent

Contact Information:

Rick Grimaldi

Two Logan Square, 12th Floor, 100 N. 18th Street, Philadelphia, PA 19103
Ph: (610) 230-2136
E-mail: rgrimaldi@fisherphillips.com
Additional E-mails: dinnocenzo@fisherphillips.com

Attached Documents:

Response to a Petition to Revoke a Subpoena:Oxarc Inc. - Opposition to General Counsel's Petition to Revoke Subpoena B-1-19NVZAR (7-24-20).pdf

Start Another E-Filing

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

OXARC, INC.	:	
	:	
and	:	CASES 19-CA-230472; 19-CA-237336;
	:	19-CA-237499; 19-CA-238503;
	:	19-CA-232728; 19-CA-248391
TEAMSTERS LOCAL 839	:	
	:	
and	:	
TEAMSTERS LOCAL 690	:	
	:	
and	:	
	:	
INTERNATIONAL BROTHERHOOD OF TEAMSTERS	:	
	:	
and	:	
	:	
JARED FOSTER, an individual.	:	

RESPONSE TO JULY 21, 2020 ORDER TO SHOW CAUSE OF RESPONDENT IN OPPOSITION TO COUNSEL FOR THE GENERAL COUNSEL'S PETITION TO REVOKE SUBPOENA DUCES TECUM NO. B-1-19NVZAR

Respondent Oxarc, Inc. ("Respondent" or "Oxarc"), by and through its undersigned counsel, hereby files this Response to the July 21, 2020 Order to Show Cause of Respondent Oxarc, Inc. in Opposition to Counsel for the General Counsel's Petition to Revoke Subpoena Duces Tecum No. B-1-19NVZAR.

I. Background

On July 15, 2020, Respondent served a named party, Jared Foster (hereinafter "Foster"), with Subpoena Duces Tecum No. B-1-19NVZAR (hereinafter "Subpoena"). In an Attachment to the Subpoena, Respondent requested twelve (12) enumerated categories of documents from Foster. In stark contrast to Counsel for the General Counsel's contentions, and as will be demonstrated below, Respondent's requests are both relevant and appropriate.

II. Applicable Legal Standards

Section 102.31(b) of the Board's Rules and Regulations states that a subpoena will be revoked if the evidence requested "does not relate to any matter under investigation or in question in the proceedings," the subpoena "does not describe with sufficient particularity the evidence whose production is required," or "if for any other reason sufficient in law the subpoena is otherwise invalid." 29 CFR § 102.31(b). In determining whether "any other reason sufficient in law" exists to revoke a subpoena, the Board has looked to the Federal Rules of Civil Procedure as "useful guidance." *Brink's Inc.*, 281 NLRB 468 (1986).

In ruling on a petition to revoke, the judge may evaluate the subpoena in light of any modifications or limitations that the subpoenaing party offers or agrees to in its opposition to the petition. *See, e.g., Bannum Place of Saginaw*, 7-CA-211090, 2018 WL 6628927, at *1 n. 2 (unpub. Board order issued Dec. 17, 2018); and *FCA US LLC*, 8-CA-185825, 2017 WL 5000838, at *1 n. 3 (unpub. Board order issued Oct. 31, 2007); *see also CNN America, Inc.*, 353 NLRB 891 (2009) (rejecting employer's argument that the General Counsel's subpoena "must stand or fall as a whole"), *final decision and order issued* 361 NLRB 439 (2014), *recons. denied* 362 NLRB No. 38 (2015), *rev. granted in part and denied in part* 865 F.3d 740 (D.C. Cir. 2017).

III. Arguments in Opposition to Counsel for the General Counsel's Petition to Revoke

A. Document Request Numbers 1 Through 3 of the Subpoena Are Relevant

Document Requests numbers 1 through 3 of the Subpoena request documents relating to Foster's discipline and termination. Counsel for the General Counsel maintains these document requests should be quashed for the following reasons: (1) the documents requested are under Respondent's control; and (2) the documents are irrelevant given that Respondent has admitted in

its Answer to the Third Consolidated Complaint that it disciplined and eventually terminated Foster's employment. Both arguments are unavailing.

First, the mere fact that Respondent possesses certain documents relevant to Foster's history of discipline and termination does not mean that Respondent possesses ***all*** such documents. *Bakery Workers*, 21-CA-171340, 2016 WL 4141212 (unpub. Board order issued Aug. 3, 2016) ("[T]he possibility that the requested information may be available from other sources is not a basis to quash a subpoena, as the requested documents may be necessary to corroborate or supplement the investigative file."). Foster may have documents relating to his discipline and termination that were not provided to Respondent during the course of Foster's employment. By way of example, Foster could have maintained a journal with excerpts specific to his discipline and/or termination. In addition, Foster could be in possession of communications such as text messages that speak to his discipline and/or termination of employment from Respondent.

Second, Foster does not bear the risk of an adverse inference if he truthfully and completely responds to the Subpoena, which, may include a response that he is not in possession of such documents. Succinctly stated, the adverse inference rule consists of the principle that "when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him." *Auto Workers v. NLRB*, 459 F.2d 1329, 1335-1336 (D.C. Cir. 1972) (describing the adverse inference rule as "more a product of common sense than of the common law"); *see also Metro-West Ambulance Service, Inc.*, 360 NLRB No. 124 at pp. 2-3 and at fn. 13 (2014); *SKC Electric*, 350 NLRB 857, 872 (2007). There is a difference between a deliberate failure to produce documents in one's possession and an acknowledgment that one is not in possession of such documents and/or no such documents exist. *Compare Shamrock Foods Co. v. NLRB*, 779 F. App'x 752, 754-55 (D.C. Cir. 2019) ("The Board is entitled

to impose a variety of sanctions to deal with subpoena noncompliance, including permitting the party seeking production to use secondary evidence, precluding the noncomplying party from rebutting that evidence or cross-examining witnesses about it, and drawing adverse inferences against the noncomplying party."). There can be no fear of an adverse inference if Foster responds to the document requests based on the documents in his possession.

Moreover, the asserted nonexistence of requested records is not grounds for revoking a subpoena. *See Ironworkers Local 433*, 21-CB-129959, 2015 WL 471558 (unpub. Board order issued Feb. 4, 2015) ("If no evidence responsive to any portion of the subpoena exists, the custodian of records must provide sworn testimony to that effect, including a description of the [party's] efforts to identify and locate such evidence.").

Third, Respondent's admission to disciplining Foster and terminating his employment does not render Document Request numbers 1 through 3 irrelevant. According to Counsel for the General Counsel, it remains disputed as to whether Foster's discipline and termination were causally related to his alleged engagement in union protected activities. As discussed above, Foster may be in possession of self-created documents, or communications with non-Respondent third-parties that are relevant for purposes of bolstering Respondent's position that it legitimately disciplined Foster and terminated his employment and, further, that the decision had no bearing on Foster's alleged engagement in protected union activities.

For these reasons, Document Request numbers 1 through 3 should not be revoked.

B. Document Request Numbers 4 Through 6 of the Subpoena are Hereby Preserved for a Compliance Proceeding, if Applicable

Document Request numbers 4 through 6 relate to Foster's post-employment financial state and mitigation efforts. Counsel for the General Counsel petitions to revoke these requests because

they are not relevant to the merit phase of this proceeding. As detailed below, these requests are relevant.

If the ALJ finds Respondent violated the Act with respect to Foster, the ALJ will necessarily impose a remedy. Having information related to Foster's current employment is not necessary for this purpose and therefore not premature. *See, e.g.*, *Hennes & Mauritz, LP d/b/a H&M and United for Respect*, Cases 32-CA-250461, 2020 WL 3440105 (June 22, 2020 (Sotolongo, J.) (finding that the employer unlawfully discharged its employee and ordering remedy of reinstatement and make-whole remedy). On the contrary, the ALJ must determine whether reinstatement, for example, is a proper remedy. *See id.* Foster's post-employment financial records and mitigation efforts are required to determine whether there can even be a make-whole remedy. If Foster has secured immediate employment, and if he makes the same or more than he was making at Oxarc, this will necessarily impact that analysis.

As to Counsel for the General Counsel's contention that such documents are only relevant to compliance proceedings, Oxarc submits that it will, alternatively, be satisfied with (1) a stipulation that the ALJ will not craft an order speaking to alleged damages or reinstatement until a compliance proceeding takes place, should a violation be found, and (2) a written instruction to Foster to preserve and maintain documents related to the information and documents requested in these requests.

C. Document Request Numbers 7 and 10 of the Subpoena are Appropriate and are not in Violation of Section 8(a)(1) of the Act

Document Request numbers 7 and 10 of the Subpoena request documents relating to Foster's alleged participation in protected union activity(ies). Counsel for the General Counsel opposes these requests on the grounds that they unlawfully infringe upon Foster's Section 7 rights. Counsel for the General Counsel's arguments miss the point of the requests entirely.

In *NLRB v. Robbins Tire & Rubber Co.*, cited by Counsel for the General Counsel, the Supreme Court upheld the Board's policy preventing parties in unfair labor practice proceeding from obtaining, in advance of the hearing, copies of statements collected during the investigation from potential witnesses. 437 U.S. 214 (1978). In so doing, the Court emphasized that a holding to the contrary would "disturb the existing balance of relations in unfair labor practice proceedings, a delicate balance that Congress has deliberately sought to preserve and that the Board maintains is essential to the effective enforcement of the NLRA." *Id.* at 236. Specifically, the Court emphasized that providing witness statements in advance of the hearing would create the obvious risk of employers intimidating employee witnesses prior to trial "in an effort to make them change their testimony or not testify at all." *Id.*

To accommodate this concern, the Board's "*Jencks*[1]" rule provides that a witness' pretrial statement will be furnished to a litigant only after Counsel for the General Counsel has called the witness on direct, to be used in cross-examination. *NLRB Rules and Regulations*, § 102.118(b)(1); *NLRB Division of Judges Bench Book*, § 8-500. That rule is founded upon the need "to forestall such intimidation and harassment as would otherwise be possible because of the leverage inherent in the employer-employee relationship." *NLRB v. Lizdale Knitting Mills, Inc.*, 523 F.2d 978, 980 (2d Cir. 1975).

Robbins is inapplicable to the present matter. First, Document Request numbers 7 and 10 of the Subpoena do not request Fosters' witness statement(s). In fact, instruction number 12 in Respondent's statement *specifically* provides otherwise:

> Through this subpoena, Respondent is not seeking the production of any affidavit prepared by the NLRB in the course of its investigation of this matter. To the extent you object to the production of documents and/or recordings requested by this subpoena on the grounds that compliance with the subpoena would require the

[1] For the origin of the rule, *see Jencks v. U.S.*, 353 U.S. 657 (1957).

> release or disclosure of documents and/or recordings that disclose the identities of employees or identify other alleged confidential or protected information, you are requested to produce all responsive documents and/or recordings for an in-camera inspection by the Administrative Law Judge for determination of whether claims involving the disclosure of employee identities or confidential or protected information are valid, or whether such information can be redacted so that the applicable documents and/or recordings can be produced to Respondent.

Respondent's deliberate inclusion of this instruction makes clear that, contrary to Counsel for the General Counsel's opinion, it understands the scope of a proper subpoena and is in no way including such Document Requests to unlawfully usurp Foster's protections under the National Labor Relations Act ("NLRA").

Second, even if these Document Requests envision the production of a witness statement made by Foster, there is no risk of intimidation, harassment, or retaliation, as there is indeed no employer-employee relationship to leverage. Foster is a *former* employee of Oxarc. Therefore, the Board's *Jencks* rule, the caselaw on which it is based, and the case law cited by Counsel for General Counsel in support of the present Petition to Revoke, are wholly inapplicable here. *Compare Wright Elec., Inc.*, 327 NLRB 1194 (1999), *enf'd* 200 F.3d 1162 (8th Cir. 2000) (involving the issue of whether respondent may obtain copies of union authorization cards by subpoena); *Chino Valley Med. Ctr.*, 362 NLRB 283 (2015), *enf'd sub. nom. United Nurses Ass'n of Cal. v. NLRB*, 871 F.3d 767 (9th Cir. 2017) (same); *Guess, Inc.*, 339 NLRB 432 (2003) (same); *National Tel. Directory Corp.*, 319 NLRB 420 (1995) (same).

To the contrary, the court has held that where subpoenaed communications between a union and an employee witness for the union are relevant to the employer's case and to the credibility of the employee, the ALJ ***should not*** revoke the subpoena in its entirety. Rather, the ALJ should require production of responsive information that would not infringe on any

confidentiality interests under *National Telephone* (such as the mere date and time of calls between the union and the employee), and should conduct an *in camera* review to determine if other responsive information that might infringe on employee confidentiality interests outweighs the employer's interests or to narrow the scope of the subpoena. *See Ozark Automotive Distributors, Inc. v. NLRB*, 779 F.3d 576 (D.C. Cir. 2015), *denying enf. and remanding* 357 NLRB 1041 (2011); *see also Veritas Health Services, Inc. v. NLRB*, 895 F.3d 69, 81 (D.C. Cir. 2018) (quashing the subpoena was an abuse of discretion "because the missing evidence prejudiced a critical element of that case").

While Counsel for the General Counsel's Petition to Revoke as to Document Request numbers 7 and 10 must be denied for the above reasons, as an alternative measure, and as set forth in instruction 12 to the Subpoena and codified in *National Telephone*, responsive documents could be produced for an in-camera inspection to determine which documents would be provided. The foregoing would necessarily address any Section 7 employee confidentiality interests potentially implicated by the document requests.

D. Document Request Numbers 8-9 and 11-12 of the Subpoena are Appropriate and Non-Privileged

Document Request numbers 8 and 9 seek documents and communications pertaining to any potential witnesses or persons with knowledge or facts pertinent to this action, as well as those that relate to Respondent's alleged violation of the NLRA. Document Request numbers 11 and 12 of the Subpoena concern emails, text messages, and documents that relate to the allegations in the Third Amended Complaint related to Foster. Counsel for the General Counsel maintains that such requests (i) are impermissible attempts at pre-trial discovery and (ii) seek privileged information. Each is addressed in turn below.

With regard to pre-trial discovery, Counsel for the General Counsel's argument ignores the obvious: Respondent is seeking documents to be produced *at the hearing* in this matter, not in advance thereof. Counsel for the General Counsel's argument related to the possibility of retaliation and further discrimination is wholly inapplicable, as Respondent will not have access to the information until the hearing has begun. Moreover, Foster is no longer an employee of Respondent and therefore is not at risk for retaliation or discrimination. Finally, Counsel for the General Counsel's claim in this matter of unlawful retaliation hinges on the fact that Respondent *must have known* about the alleged protected, concerted activity in which Foster engaged. *See Edifice Restoration Contractors, Inc.*, 360 NLRB 186, 193 (2014) (setting forth the requirements of a *prima facie* case of retaliation). Thus, any communications that identify the alleged activity, based on Counsel for the General Counsel's allegations, would relate to activity already known by Respondent. Consequently, there is again no risk of retaliation. The Board precedent cited by Counsel for the General Counsel is simply inapplicable.

With respect to the concern over privileged documents, Respondent is not seeking privileged communications. Again, Counsel for the General Counsel ignores, or fails to recognize, the purpose of the requests. As noted above, Respondent's knowledge of Foster's protected, concerted activity must be known by Respondent in order for the claim to prevail. Therefore, Respondent is seeking documents and communications that show Respondent's knowledge of Foster's activity. In other words, communications with Respondent or other witnesses regarding the alleged *known* activity. This is not meant to include privileged communications. On the contrary, the request is directed to Foster and seeks communications he himself had with potential witnesses, not communications the Board or the Union had with witnesses, or even with Foster. For avoidance of doubt, Respondent will stipulate to the fact and clarify that these requests do not

seek any documents subject to privilege or attorney work product, and only seek communications in Foster's possession that relate to Respondent's knowledge of his protected activity. Such clarification addresses the concerns raised by Counsel for the General Counsel and should be deemed a sufficient compromise.

IV. Conclusion

WHEREFORE, for all the reasons stated above, Respondent respectfully requests that Counsel for the General Counsel's Petition to Revoke Subpoena Duces Tecum No. B-1-19NVZAR be denied in its entirety.

Respectfully submitted this 24th day of July, 2020.

FISHER & PHILLIPS LLP

s/ Rick Grimaldi

Rick Grimaldi, Esquire
Samantha Sherwood Bononno, Esquire
Kelsey E. Beerer, Esquire

Two Logan Square, 12th Floor
100 N. 18th Street
Philadelphia, PA 19103
Telephone: (610) 230-2150
Facsimile: (610) 230-2151
rgrimaldi@fisherphillips.com
sbonnono@fisherphillips.com
kbeerer@fisherphillips.com

Attorneys for Respondent Oxarc, Inc.

CERTIFICATE OF SERVICE

Pursuant to Section 102.114 of the Board's Rules and Regulations, I, Rick Grimaldi, Esquire, hereby certify that on the 24th day of July, 2020, the foregoing Response to the July 21, 2020 Order to Show Cause of Respondent Oxarc, Inc. in Opposition to Counsel for the General Counsel's Petition to Revoke Subpoena Duces Tecum No. B-1-19NVZAR was filed electronically and served via e-mail on all parties and counsel of record as follows:

(Via E-File)
The Honorable Gerald Etchingham
Associate Chief Judge

(Via E-Mail)
The Honorable Ariel L. Sotolongo
Administrative Law Judge
National Labor Relations Board
Division of Judges
Ariel.Sotolongo@nlrb.gov

Adam Morrison, Esquire
National Labor Relations Board, Region 19
Adam.Morrison@nlrb.gov

Matthew Harris, Esquire
Staff Attorney
International Brotherhood of Teamsters
mharris@teamster.org

s/ Rick Grimaldi
Rick Grimaldi, Esquire

Exhibit D

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

OXARC, INC.

and **Cases 19-CA-230472**

TEAMSTERS LOCAL 839

and **Cases 19-CA-237336**
19-CA-237499
19-CA-238503

TEAMSTERS LOCAL 690

and **Case 19-CA-248391**

INTERNATIONAL BROTHERHOOD OF TEAMSTERS

and **Case 19-CA-232728**

JARED FOSTER, AN INDIVIDUAL

ORDER TO SHOW CAUSE REGARDING COUNSEL FOR THE GENERAL COUNSEL'S PETITION TO REVOKE SUBPOENA

On July 21, 2020, counsel for the General Counsel filed a Petition to Revoke subpoena duces tecum B-1-19NVZAR in the above matter. The hearing is set to commence on August 3, 2020, at 9 a.m. by Zoom videoconference.

Counsel for the Respondent is hereby given until no later than close of business on Friday, July 24, 2020 to show why counsel for the General Counsel's Petition to Revoke subpoena should not be granted.

SO ORDERED.

Dated at San Francisco, California, this 21st day of July 2020.

Ariel L. Sotolongo
Administrative Law Judge.

Served by email upon the following:

For the NLRB Region 19:
Adam D. Morrison, Esq.
Email: adam.morrison@nlrb.gov
Sarah McBride, Esq.,
Email:sarah.mcbride@nlrb.gov

For the Charging Party:
Matthew Harris, Staff Attorney,
Email: mharris@teamster.org
(IBT)

For the Respondent:
Rick Grimaldi, Esq.,
Email: rgrimaldi@fisherphillips.com
Samantha S. Bononno, Esq.,
Email: sbononno@fisherphillips.com
Kelsey E. Beerer, Esq.,
Email: kbeerer@fisherphillips.com
(Fisher Phillips, LLP)

Exhibit E

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

OXARC, INC.		
and	**Cases**	**19-CA-230472**
TEAMSTERS LOCAL 839		
and		**19-CA-237336** **19-CA-237499** **19-CA-238503**
TEAMSTERS LOCAL 690		
and		**19-CA-248391**
INTERNATIONAL BROTHERHOOD OF TEAMSTERS		
and		**19-CA-232728**
JARED FOSTER, an Individual		

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO REVOKE SUBPOENA DUCES TECUM

On December 9, 2019, the Regional Director for Region 19 of the Board issued the Third Consolidated Complaint in the above-captioned cases. The complaint alleges, inter alia, that Oxarc, Inc. ("Respondent"), discharged employee Jared Foster on June 14, 2018, which Respondent admits in its answer to the complaint, because Foster engaged in union and/or protected concerted activity, which Respondent denies. Thereafter, on July 15, 2020, Respondent served Subpoena Duces Tecum B-1-19NVZAR on Foster ("Subpoena"). On July 21, 2020, the General Counsel filed a Petition to revoke said subpoena ("Petition"), and on July 24, 2020, Respondent filed its response in opposition to the Petition. The Subpoena seeks the production of the following items by Foster:

1. Any and all Documents and/or Communications that reflect, relate to, or refer to any discipline or corrective action you received by Respondent during your employment with Respondent.

2. Any and all Documents and/or Communications that reflect, relate to, or refer to the termination of your employment with Respondent.
3. Any and all Documents and/or Communications that reflect, relate to, or refer to any discipline you received while employed by Respondent, including verbal warnings, written warnings or any discussions of performance or work rule violations.
4. Any and all Documents and/or Communications that reflect, relate to, or refer to any and all employment and/or offers of employment secured by you from June 14, 2018 to present.
5. Your tax returns, both state and federal, for the tax and/or calendar years 2018 through the present.
6. Any and all Documents that reflect, relate to, or refer to income you have received from June 14, 2018 to the present, including, but not limited to, any sums received from unemployment compensation, disability benefits, social security, workers' compensation, or other source(s).
7. Any and all Documents and/or Communications that reflect, relate to, or refer to any alleged union and/or protected concerted activities that you engaged in during your employment with Respondent.
8. Any and all Documents that relate to any Communications, oral or written, taken or received by you, of a potential witness or person with knowledge of facts pertinent to this Complaint.
9. Any and all Documents and/or Communications that reflect, relate to, or refer to the Respondent's alleged violation(s) of the National Labor Relations Act with respect to you.
10. Any and all Communications between you and the Union concerning the allegations contained in the Complaint.
11. Any and all e-mails or text messages that reflect, relate to, or refer to your claims at issue in this Complaint.
12. Any and all Documents which support, rebut, or otherwise concern the allegations contained in the Complaint.

The Board is authorized under Section 11(1) of the National Labor Relations Act to subpoena "any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question." *NLRB v. G.H.R. Energy Corp.*, 707 F.2d 110, 113 (5th Cir. 1982). Section 11(1) of the Act specifically provides that the Board shall revoke a subpoena only:

> …if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpoena does not describe with sufficient particularity the evidence whose production is required. Subpoenaed information must be produced if the information sought is "not plainly incompetent or irrelevant to any lawful purpose." *Endicott Johnson Corp. v. Perkins,* 317 U.S. 501, 509 (1943).

In this regard, I note that the Board and the courts have interpreted the concept of relevance, for subpoena purposes, quite broadly. Thus, subpoenaed information should be produced if it relates to any matter in question, or if it can provide background information or lead to other evidence potentially relevant to an allegation in the complaint. Board Rules, Section 102.31(b); *Perdue Farms*, 323 NLRB 345, 348 (1997), affd. in relevant part 144 F.3d 830, 833-834 (D.C. Cir. 1998) (the information needs to be only "reasonably relevant").

Although the General Counsel's and other parties' authority to subpoena information is expansive, it is not unlimited, and a valid nexus must exist between the issues raised by the pleadings and the items sought by the subpoena. Additionally, I must give proper consideration to issues of privacy and confidentiality, particularly if the potential relevance of subpoenaed items is only marginal. Moreover, even if the sought-after evidence may arguably be relevant, I must also take into consideration, pursuant to the Federal Rules of Evidence (FRE) Section 403, whether the evidence's probative value may be outweighed by the danger that such evidence may cause unfair prejudice, undue delay, confuse the issues, or be cumulative in nature and ultimately burden the record and thus delay the hearing. Keeping these principles in mind, I will address the various subpoenas and motions to revoke these.

Subpoena Items 1-3

In its Motion, the General Counsel argues that most, if not all, of the documents sought by Respondent from Foster in items 1-3 are already in Respondent's possession, inasmuch it was Respondent who initiated and issued the disciplinary actions described in the subpoena. To the extent that these are the documents sought by the subpoena, the General Counsel has a valid argument; Respondent, as the promulgator of the disciplinary actions, should already be in possession of such documents and is the best source for them. Accordingly, to the extent these documents are sought, the General Counsel's Motion is granted. Nonetheless, Respondent argues that Foster may be in possession of other documents that address or relates to such disciplinary actions, providing an example of a diary about these events that Foster may have kept. I agree with Respondent that any such documents would be relevant and subject to production, inasmuch they may reveal information that might be probative regarding the accuracy of information Foster may have provided to the General Counsel or the Charging Party unions. Such documents, however, to the extent that they reflect on the events discussed by Foster in any affidavit(s) provided to the Board during the course of the investigation, or in any communications with the union(s), need not be produced until Foster has testified in direct examination, and prior to his cross-examination. Accordingly, the General Counsel's Motion is denied with regard to other documents not generated by Respondent, provided they are produced at the time described above.

Subpoena Items 4-6

The General Counsel objects to the production of the documents sought in these subpoena items because they relate to backpay issues and mitigation of damages issues, arguing that those issues would only be relevant during a compliance proceeding such a backpay specification. I agree with the General Counsel. While it is true, as argued by Respondent, that if I find merit to the allegation in the complaint that Foster was unlawfully discharged, I would order his re-instatement and a make-whole remedy, the specifics of that remedy are not at issue in this proceeding. These items are thus not relevant to the instant proceeding, since only the lawfulness of Foster's discharge is at issue at this stage. Indeed, I were to find that this allegation lacks merit, the information sought by Respondent would not only be moot, but its disclosure might arguably have infringed on Foster's privacy and confidentiality rights in such circumstances. Accordingly, I grant the Motion to revoke these items of the subpoena.

Subpoena Items 7 and 10

In its Motion, the General Counsel argues that items 7 and 10 in Respondent's subpoena should be revoked because they seek information provided by Foster in his Board affidavit, because it because seeks protected communications between Foster and the union, and or protected communications between Foster and other employees—the latter information which the General Counsel argues is an unlawful request in violation of Section 8(a)(1), citing *Wright Elec., Inc.*, 327 NLRB 1194, 1195 (1999), *enf'd.* 200 F.3d 1162 (8th Cir. 2000); and *Chino Valley Med. Ctr.*, 362 NLRB 283, 283 n. 1 (2015), *enf'd. sub nom. United Nurses Ass'n of Cal. v. NLRB*, 871 F.3d 767 (9th Cir. 2017), as well as others. With regard to the argument that it is seeking a copy of Foster's Board affidavit through its subpoena, Respondent avers that it is not, pointing to item 12 of its subpoena instructions. Accordingly, I see no need to address this issue. With regard to the argument that communications between union and employees they represent—or seek to represent—are protected from disclosure through subpoena, there is strong support for this argument. See, *National Telephone Directory, Corp.*, 319 NLRB 420, 421-422 (1995); *Chino Valley*, supra. Certainly, to the extent that Foster may have provided a statement or other written materials to the union which address the same issues or conduct alleged in the complaint and which he addressed in his Board affidavit, it would be improper to direct Foster to disclose such information prior to his testimony on direct examination, lest Respondent obtain through the proverbial "back door" information it cannot obtain through the front door. Just as with his Board affidavit, this information or documents should be disclosed to Respondent after the conclusion of Foster's direct examination, not before. Accordingly, to that extent, I partly grant the General Counsel's motion to revoke. It is true, as Respondent points out, that other aspects of Foster's communications with the union are not protected from pre-direct testimony disclosure, such as mere date and time of calls and communications. See, e.g., *Ozark Automotive Distributors, Inc. v. NLRB*, 779 F3d. 576 (D.C. Cir. 2015). To that extent, I deny the General Counsel's motion, and direct that such information be provided. If there is any uncertainty as to whether the communications or documents at issue may fall into one of the above categories,

those documents should be presented to me, so that I may conduct an in-camera inspection, to determine whether any of the information in question is protected.

The above principles also hold true for communications between Foster and other employees, for example, to the extent the subpoena requests such records.[1] The potential to expose employees' protected activity, and possibly expose them to coercion or intimidation, in my view outweighs Respondent's right to such information, at least prior to testimony regarding the identity of such employees or the nature of their activity. Should Foster reveal the identity of such employees and/or the nature of their activities during the course of his direct examination, however, due process dictates that Respondent would then be entitled to receive any documents or communications exchanged between them and Foster that address the activities testified about, for purposes of cross-examination. Accordingly, I partly grant the General Counsel's motion in that regard. Finally, I note that the subpoena also potentially requests documents and communications regarding the issues alleged in the complaint between Foster and third parties not including the union or other employees. To the extent it does, such communications are not protected and should be disclosed pursuant to subpoena. Accordingly, the General Counsel's motion is denied in that regard.

Subpoena Items 8, 9, 11 and 12

The General Counsel objects to the above items on the basis that they appear to seek work product information, or information which is not subject to pre-trial discovery pursuant to Board rules. The language in the above-enumerated items, I find, is vague and ambiguous enough that it could be interpreted in the manner the General Counsel asserts. To the extent it is, I grant the General Counsel's motion, inasmuch communications between Foster and the General Counsel and the Union are protected not only for work-product reasons, but also for the reasons discussed above regarding other subpoena items. The principles as discussed above with regards to items 7 and 10 holds true for communications between Foster and other employees. While it is true that Foster is no longer an employee and thus not subject to potential intimidation or retaliation, as argued by Respondent, other current employees with whom Foster may have communicated regarding the allegations of the complaint would be subject to such potential retaliation or intimidation. Accordingly, as discussed above with regards to item 7 and 10, such communications need not be revealed unless and until Foster testifies about them during direct examination. Accordingly, the General Counsel's motion is granted in that respect. As discussed above, however, such protection does not extend to communications between Foster and third parties other than the Board, the union, or fellow employees. Any communications with such third parties must be disclosed, and the General Counsel's motion is denied in that regard. As with the other items discussed above, any uncertainty as to whether the communications or documents at issue may fall into one of the above categories, those

[1] In that regard, I need not address the General Counsel's contention that such subpoena request violates Section 8(a)(1) of the Act. Such allegation is not currently alleged in the complaint, so the issue is not before me.

documents should be presented to me, so that I may conduct an in-camera inspection, to determine whether any of the information in question is protected.

Accordingly, and for the above reasons, General Counsel's Motion to Revoke Subpoena is granted in part and denied in part.

So Ordered.

Dated at San Francisco, California, this 28th day of July 2020.

Ariel L. Sotolongo
Administrative Law Judge.

Served by email upon the following:

For the NLRB Region 19:
Adam D. Morrison, Esq.
Email: adam.morrison@nlrb.gov
Sarah McBride, Esq.,
Email:sarah.mcbride@nlrb.gov

For the Charging Party:
Matthew Harris, Staff Attorney,
Email: mharris@teamster.org
(IBT)

For the Respondent:
Rick Grimaldi, Esq.,
Email: rgrimaldi@fisherphillips.com
Samantha S. Bononno, Esq.,
Email: sbononno@fisherphillips.com
Kelsey E. Beerer, Esq.,
Email: kbeerer@fisherphillips.com
(Fisher Phillips, LLP)

Exhibit U

From: Williams, Travis <Travis.Williams@nlrb.gov>
Sent: Monday, August 3, 2020 9:34 AM
To: Grimaldi, Rick; Bononno, Samantha
Subject: RE: Oxarc, Inc., 19-CA-263356

Mr. Grimaldi and Ms. Bononno,

Last Friday afternoon, the Regional Director reviewed the evidence in the Charge and found merit to the allegation.

Sincerely,
Travis

From: Williams, Travis
Sent: Friday, July 24, 2020 12:58 PM
To: rgrimaldi@fisherphillips.com; sbononno@fisherphillips.com
Subject: Oxarc, Inc., 19-CA-263356

Mr. Grimaldi and Ms. Bononno,

Attached is a request for response in connection with the above captioned Unfair Labor Practice Charge. I've attached a copy of the Charge for your convenience.

Sincerely,

J. Travis Williams
Board Agent | Region 19
National Labor Relations Board
915 Second Avenue, Room 2948
Seattle, Washington 98174
Tel: (206) 220-6321 (direct)
Fax: (206) 220-6305
travis.williams@nlrb.gov

Exhibit V

From: Grimaldi, Rick
Sent: Sunday, August 2, 2020 9:02 PM
To: Ariel Sotolongo; Mark Eskenazi; Adam Morrison; Sarah M McBride; Harris, Matthew
Cc: Beerer, Kelsey; Bononno, Samantha; Jack Holland
Subject: Request For Continuance

Dear Parties, Judge Sotolongo, and Court Room Deputy Eskenazi:

As a follow-up to our email of earlier today and through the course of our preparations, we have realized the vast undertaking associated with proceeding with this week's hearing by virtual means. By way of one example, while we appreciate that Counsel for the General Counsel volunteered to take the lead on compiling Joint Exhibits for the hearing, due to no fault of Respondent, the Joint Exhibits were only finalized as of yesterday, August 3, 2020. In comparing those proposed hundreds of pages with Respondent's own documents, Respondent continues to find additional documents that must be added, even as we sit here now. Re-compiling, marking and bookmarking hundreds of pages of joint exhibits in such a short timeframe is simply unworkable. The number of electronic files, each with a multitude of bookmarks, does not lend itself to virtual presentation.

As recognized by Your Honor in the first pre-hearing conference with the parties, the amount of documents involved in this proceeding makes this case a less than ideal candidate for a virtual hearing. Moreover, the parties agree that this case will take *at least* five days. As we understand it, none of the participants have ever attempted such a feat virtually. Upon our attempts to prepare virtually, it will only take longer. It is therefore likely impossible that we can complete this hearing in one week's time.

As counsel for Respondent has repeatedly made clear, we are zealously representing our client and witnesses; therefore plan to represent them in person during this hearing. As a result, attempting to present multiple participants virtually from a single location is yet another hurdle.

Finally, as illustrated by Your Honor's email a moment ago, we are certain to encounter multiple technical difficulties related to connectivity and accessibility. In fact, counsel for Respondent is unable to access Sharepoint this evening.

In light of the above, Respondent submits that it will be prejudiced should this hearing go forward in a virtual manner. For these reasons, Respondent withdraws its consent to have this hearing conducted via Zoom conference. Accordingly, Respondent requests that the hearing in this matter be continued until a later date when it can safely be conducted in person.

Counsel for Respondent is available to discuss the foregoing at Your Honor's convenience.

Respectfully,

Rick Grimaldi
Attorney at Law
Fisher & Phillips LLP
Two Logan Square | 12th Floor | 100 N. 18th Street | Philadelphia, PA 19103
rgrimaldi@fisherphillips.com | O: (610) 230-2136 |
vCard | Bio | Website *On the Front Lines of Workplace Law℠*

Exhibit W

From: Sotolongo, Ariel L. <Ariel.Sotolongo@nlrb.gov>
Sent: Sunday, August 2, 2020 9:58 PM
To: Grimaldi, Rick; Eskenazi, Mark; Morrison, Adam D.; McBride, Sarah M; Harris, Matthew
Cc: Beerer, Kelsey; Bononno, Samantha; Jack Holland
Subject: Re: Request For Continuance

Counsel,

In light of the lateness of these developments, we will discuss this tomorrow morning, via Zoom, at 9 am, before we open the record.

Ariel L. Sotolongo

Administrative Law Judge

Get Outlook for iOS

From: Grimaldi, Rick <rgrimaldi@fisherphillips.com>

Sent: Sunday, August 2, 2020 6:01:55 PM

To: Sotolongo, Ariel L. <Ariel.Sotolongo@nlrb.gov>; Eskenazi, Mark <Mark.Eskenazi@nlrb.gov>; Morrison, Adam D. <Adam.Morrison@nlrb.gov>; McBride, Sarah M <Sarah.McBride@nlrb.gov>; Harris, Matthew <mharris@teamster.org>

Cc: Beerer, Kelsey <kbeerer@fisherphillips.com>; sbononno@fisherphillips.com <sbononno@fisherphillips.com>; Jack Holland <Jack@rmbllaw.com>

Subject: Request For Continuance

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Respectfully,

Rick Grimaldi
Attorney at Law
Fisher & Phillips LLP
Two Logan Square | 12th Floor | 100 N. 18th Street | Philadelphia, PA 19103
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Exhibit X

OFFICIAL REPORT OF PROCEEDINGS

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

REGION 19

In the Matter of:

Oxarc, Inc.,	**Case Nos.**	**19-CA-230472**
		19-CA-237336
Employer,		**19-CA-237499**
		19-CA-238503
and		**19-CA-248391**
		19-CA-232728

Teamsters Local 690, International Brotherhood of Teamsters,

Union,

and

Jared Foster,

Individual.

_____

_____

Place: San Francisco, California

Dates: August 3, 2020

Pages: 1-26

Volume: 1

OFFICIAL REPORTERS
eScribers, LLC
E-Reporting and E-Transcription
7227 North 16th Street, Suite 207
Phoenix, AZ 85020
(602) 263-0885

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 19

In the Matter of: OXARC, INC., Employer, and TEAMSTERS LOCAL 690, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, Union, and JARED FOSTER, Individual.	Case Nos. 19-CA-230472 19-CA-237336 19-CA-237499 19-CA-238503 19-CA-248391 19-CA-232728

The above-entitled matter came on for Zoom hearing, pursuant to notice, before **ARIEL L. SOTOLONGO**, Administrative Law Judge, at the National Labor Relations Board Office, 901 Market Street, Suite 300, San Francisco, California 94103, on **Monday**, **August 3, 2020, 9:06 a.m.**

A P P E A R A N C E S

On behalf of the Employer:

SAMANTHA S. BONONNO, ESQ.
RICK GRIMALDI, ESQ.
KELSEY E. BEERER, ESQ.
FISHER & PHILLIPS LLP
150 N. Radnor Chester Road
Suite C300
Radnor, PA 19087
Tel. (412)822-6629
Fax. (412)774-6101

On behalf of the Union:

MATTHEW HARRIS, ESQ.
INTERNATIONAL BOARD OF TEAMSTERS
25 Louisiana Avenue NW
Washington, DC 20001

On behalf of the General Counsel:

ADAM D. MORRISON, ESQ.
SARAH MCBRIDE, ESQ.
NATIONAL LABOR RELATIONS BOARD
915 Second Avenue
Seattle, WA 98174
Tel. (206)220-6332
Fax. (202)827-2347

P R O C E E D I N G S

JUDGE SOTOLONGO: All right. Okay. Let's go on the record. All right. This is a formal hearing before the National Labor Relations Board in the case of Oxarc, Inc. There are a number of case numbers, cases number 19-CA-230472, 19-CA-237336, 19-CA-237499, 19-CA-238503, 19-CA-248391, and 19-CA-232728.

My name is Ariel Sotolongo. I am the administrative law judge who will be presiding over the hearing and issuing a decision in this matter. I am a judge with the -- assigned to the San Francisco Division of Judges, so any motions, any appeals, any briefs should be submitted to that office.

Now, because of the COVID-19 pandemic, the hearing is being conducted remotely using the Zoom for Government's videoconference platform. Procedures and protocols for the Zoom hearing were previously discussed with the parties during one or more of the pre-hearing conferences. Detailed written instructions and protocols were also included with the invitation to the Zoom hearing.

I expect everyone to comply with them and to handle yourselves with the same professionalism you would during an in-person trial or hearing. Because conducting or participating in the Zoom hearing may be new to some, there may be times when things may be -- may move a little slower than they would during an in-person hearing. Technical issues may

occasionally arise due to a slow or lost internet connection or other video or audio problems. However, they should not cause connection -- they should not cause extended delays assuming everyone has carefully read, and followed the written instructions and protocols.

In any event, with a little patience and cooperation, we will all get through it. So I will ask you for your continued cooperation, your patience, and your forbearance because this is new to all of us. We are here in unchartered waters. And so I want to request that you be -- continue to be cooperative, be patient, and give us your forbearance.

As for those who have joined us only to observe the hearing, I'll remind you to keep both your audio and your video output turned off at all times. Any violation of this instruction, or other instruction will result in your immediate removal, and possible referral to both Zoom and Federal authorities for other sanctions.

I also, again, remind everyone, both participants and observers, that no videotaping or audio recording is permitted. Only the court reporter may record the hearing in order to prepare the official record. Again, any violations may result in removal and other sanctions.

Again, I want to add to that that this is a new frontier for us. We're all in unchartered waters. So again, I'm going to ask for your patience. If there's any technical issues that

arise during the course of the hearing, Mr. Eskenazi is our -- is my deputy, courtroom deputy, he is amongst us the most experienced in these matters. He's going to be our air traffic controller, so to speak, and he has about eight or nine days of hearings under his belt already. So any problems that you experience, let Mr. Eskenazi know and he will try to resolve the problem.

In any -- in any event, will the parties counsel or representatives please state your appearances for the record, starting with the General Counsel.

MR. MORRISON: Thank you, Your Honor. Adam Morrison, counsel for the General Counsel along with Sarah McBride, also counsel for the General Counsel.

JUDGE SOTOLONGO: Thank you.

And for the Charging Party?

MR. HARRIS: Thank you, Your Honor. Matt Harris for the International Brotherhood of Teamsters.

JUDGE SOTOLONGO: Thank you.

And for the Respondent employer?

MR. GRIMALDI: Good morning, Your Honor, thank you. Rick Grimaldi for Respondent Employer Oxarc.

MS. BONONNO: Good morning, Your Honor, Samantha Bononno for the Respondent Employer Oxarc.

MS. BEERER: Good morning, Your Honor, Kelsey Beerer for Respondent Employer Oxarc, Inc.

JUDGE SOTOLONGO: Very well. Thank you very much. Anybody else? Very well.

I guess the first thing we need to deal with is there's been a number of motions filed, and the first and foremost among them is the requests -- I'm going to assume it's a motion, Mr. Grimaldi, that you made late last night via email.

So let me -- let me tell you where I stand on this. I understand your reasons for the motion. I read your email. I reread it several times. Correct me if I am wrong, I -- it appeared to me that one of the primary reasons for your motion was that you were experiencing a lot of difficulties, some technical difficulties, either downloading or seeing some of the documents that we are now able to see or download through our SharePoint -- our SharePoint capacity.

So please tell -- tell us what -- what problems led to this and what is your position this morning.

MR. GRIMALDI: Thank you, Your Honor. Well, I will tell you that is a part of it, but certainly not the basis for the motion. As we prepared -- and I know we all recognized this back -- as far back as the pre-trial hearing, recognizing the potential for difficulty and you, yourself, I believe suggested that, and in fact, I agreed that we are in unchartered waters.

And as we have been preparing, it's not so much the technical difficulty, although that has been part of it, it is

the extensive number of documents that are involved in this case.

And the -- we had all agreed that it would be likely a case that would carry through a week. And given the numbers of documents and the way that documents would be introduced, in fact, as we were preparing -- and Ms. Bononno can speak to that a little bit more -- we are still uncovering documents that need to be uploaded. It would appear to us that based on this approach and conducting a hearing with these documents, and of this complexity would be very prejudicial to our client as we go forward.

We see this being in fits and starts, certainly not being completed during the course of this week. And it being slower than a hearing -- a hearing, it may also be slow if we were in person, but there are, obviously, ways to move things along in person that we certainly couldn't do during the course of a Zoom hearing.

Is there anything that you want to add to that at this point?

MS. BONONNO: Sure. So just to be clear, so we worked cooperatively with the General Counsel. We have been working the past week and a half. I can represent diligently back and forth to -- to compile these joint exhibits.

But as we had talked about, you know, back at the beginning of July, there are hundreds of documents, numerous

proposals over a two-year period. And even as late as yesterday as we're trying to finalize the joint exhibits pursuant to Your Honor's order of how to bookmark and do all of that, and in comparing with the Union -- what the General Counsel provided with Respondent's records, we continue to have things to add. So we're either adding it as a separate exhibit with a separate bookmark, we're redoing all of it.

So we have not been able to upload any exhibits yet because it's a moving target. And it's just something -- it just doesn't lend itself to what could -- you know, in a one-claim hearing, you might be able to do it with these exhibits. But it's become so unwielding that I -- we just -- it's becoming unworkable for us to do, to handle these exhibits electronically.

MR. GRIMALDI: And in fact, I think that that was driven home yesterday afternoon by the General Counsel's motion to want to add yet another allegation and amend the complaint, which adds yet another layer of complexity. And honestly, as we thought about it, I don't think any us would like to be the test case for these sorts of hearings.

MS. BONONNO: And with all due respect, I don't think that -- I know eight or nine days of experience is great and it's more than any of us have, but I don't think anyone has done a five-day straight that will likely be continued anyway. And so to Mr. Grimaldi's point, I don't want to be the first

one to see how it works, and you (simultaneous speaking.)

JUDGE SOTOLONGO: All right. Before I rule on the motion and tell you where we go from here, let me hear also from General Counsel and from the Charging Party, Mr. Harris.

So starting with you, Mr. Morrison, what is the General Counsel's position?

MR. MORRISON: Thank you, Your Honor. We are opposed to the motion for continuance here. While we recognize that Zoom is maybe not the most ideal way of trying this case, it is certainly more than adequate to do it. We have experience.

I -- I would push back a little bit that while this is early on in our process of doing litigation by Zoom, this is certainly not the first time. And let's be realistic here, this is the wave of the future, at least for the foreseeable future for all of us, both in the NLRB and those practicing outside of it, the way trials are going to go.

It certainly can be done. We spent -- the General Counsel side, the Region's side, has spent a lot of time, money, and effort getting this case ready to go. We are prepared to proceed here.

We also have some other issues there, as I mentioned in our pre-hearing conference, Ms. McBride is seven months pregnant and is handling the bargaining side of that case, which makes it very difficult here with a continuance as to when we would be able to do it.

So it's most likely both because of the pandemic and because of internal matters, we would likely either need to get somebody up to speed on that or delay it even further beyond that.

Also, it is my understanding that the main -- not my understanding, it is true that the main bargaining witness, Mr. Jacobson (phonetic) who was here before and is now outside of this hearing, is set to retire soon so we would have to bring him back out of retirement for that. So for these reasons, we are opposed to the motion for a continuance.

JUDGE SOTOLONGO: All right. So Mr. Harris?

MR. HARRIS: Thank you, Your Honor. I spoke with our client, the Charging Party, this morning and we have absolutely no objection to the continuance. This trial has been delayed long enough multiple times and I don't really think further delay is going to prejudice our positions.

However, I should also say upfront, I'm not 100 percent comfortable with this form of having a trial through Zoom. And being here on the east coast while everybody else is on the west coast, it would be advantageous for us at least to be there with our client in person. So we do not oppose this motion. Thank you, Your Honor.

JUDGE SOTOLONGO: All right. Let me -- let me tell you where I stand on this, if I may. I know we're all, as I already said before, in unchartered waters and this is a new

experience for all of us.

Like you, Mr. Harris, I'm old school. I certainly believe there's no -- no substitute for an in-person hearing, but we also have to adapt to the circumstances. And we are in an unprecedented situation, at least unprecedented in our lifetime. I think none of us were around for the 1918 pandemic, at least I don't think so. And so this is unprecedented as far as those of us who are here present here today. So these are really extraordinary circumstances.

And I'm afraid, as Mr. Morrison said, that this may be quote, the wave of the future, unquote, at least for the time being until this situation ameliorates or gets better.

Now, having said that, I cannot force -- if the Respondent objects to the hearing -- and I understand they originally agreed to and since that time they have experienced a number of difficulties. So let me -- let me -- let me run this flag up the pole, Mr. Grimaldi. I don't know whether the problems you've been experiencing with the documents and other things have primarily are with your documents or the General Counsel's documents, or all documents.

Can you -- can you further expand on that a little bit?

MR. GRIMALDI: I can. Well, actually, Ms. Bononno can be because she has been working with the General Counsel to get the documents and the exhibits in place.

MS. BONONNO: Sure. Your Honor, so it isn't really a

problem with the documents. We're able to bookmark them per Your Honor's order. It's that to be able to comply with it and to do these joint exhibits, if we were in the room, at least in my experience having tried these cases, if we need to add an exhibit, we can usually do that.

In this case, it's just much harder. We're trying to do all of these joint and we will find a proposal that goes right in the middle, so you either redo the entire thousand-page document, rebookmark it. And to be honest, generally, we wouldn't have to put our exhibits out before -- at the start of the hearing, if they're not joint.

And that's another thing that we're having to do here at the start of the hearing, lay all of our exhibits up --

JUDGE SOTOLONGO: Sure.

MS. BONONNO: -- on the SharePoint. Our client is not comfortable with that. We wouldn't have to do that in person.

So it isn't that there's been any trouble. You know, we're able to figure it out. It's just that it's not yielding itself to what I -- you know, in depositions and other things I've done in a very similar context, can be done. And it's a fine platform if it has to be.

But in this case, because there are so many documents, we've already gone past the -- you know, there's only supposed to be one joint exhibit. We've gone past that. We keep adding. And it's -- so we're going to end up having

misnumbered exhibits in the record, missing exhibits in the record.

But at the end of the day we will -- you know, we will be requesting post-hearing briefing. It will be an administrative nightmare to connect the dots on those exhibits at that time. You know, we've had to pre-mark. We don't know if we're going to use it, but we were told we have to have everything uploaded.

So given -- I mean, I'm just sitting and I know you can't see, but I have binders and binders and binders of pages in front of me because, as I said, we're going to be here with our client and conducting it in the most efficient way on our end. And if you looked at these binders and try to visualize how we're supposed to do that electronically, you know, we put our best foot forward, made an effort. We truly did, but it has just become, just unworkable.

JUDGE SOTOLONGO: Well, let me -- let me run this flag up the pole. I know -- I know Mr. Morrison is not going to like this idea, but let me -- let me at least raise it and ask you what your thought is.

Would it help, Ms. Bononno, Mr. Grimaldi, if I were to say, okay, let's -- General Counsel is ready to go, the Charging Party is ready to go, let's proceed with the General Counsel's case. And then we can continue the case to give you, the Respondent, a few extra days or another couple of weeks

so -- I know we had spoken about resuming the week of August 17th, if necessary.

Would that help solve your problem if we were to -- to break after the General Counsel's case and then give you a couple of extra weeks to get your documents ready, do whatever you need to do in order to proceed?

MR. GRIMALDI: I'm going to go on mute and step away, and confer with Ms. Bononno and our client.

JUDGE SOTOLONGO: All right. Actually, Mr. Eskenazi, there's a way, I understand, that you can put Mr. Grimaldi and Ms. Bononno in a separate room so they can discuss this.

MR. ESKENAZI: I'm happy to do that. They can also go on mute and talk. But I was -- before that, if I can, Your Honor, I was just going to add some technical points about how some of these hearings have run just as a point of information. Can I --

JUDGE SOTOLONGO: Yes, go ahead.

MR. ESKENAZI: Can I do that right now?

JUDGE SOTOLONGO: Yes, go ahead.

MR. ESKENAZI: Yeah, I would just say, you know, just as a point of information, I'm the courtroom deputy in this particular case but I'm also the person leading the team of our several courtroom deputies. So I've had some experience managing them and seeing how hearings have run. So I just want to provide some points of information about some of the things

I've heard go back and forth.

As far as Unfair Labor Practice Hearings, this is the ninth Zoom hearing, nine, that is going over Zoom. Last week, there was a five-day hearing that went all week. I was courtroom deputy in a case, gosh, about a month ago now that was a seven-day hearing. It went five days and then it needed to be continued. It actually went four days. There was a holiday, or someone couldn't make the fifth day of the week, so we went into three additional days the following week or the week after.

In that particular case, which this is all public record, that was Smyrna Ready Mix Concrete, 09-CA-251578, et al. There were many number of allegations in that case, very document heavy, very witness testimony heavy. We -- that was also before the NLRB rolled out the SharePoint system which has everything populated on one page, and parties were uploading and emailing documents on the fly, if necessary, and we got through it.

There were curve balls in that case and in every case, frankly, by Zoom as far as sound and breakups of issues, you know, that had to be resolved on the fly. I'm not going to say the process is flawless every single time. There's things that need to be resolved.

But that hearing was hundreds of exhibits and if not in the thousands of pages, but hundreds of actual exhibits if not

thousands of pages. And now, we have the SharePoint system which can facilitate things, as we've discussed in pre-trial meetings, by having everything in one place.

So there's been a number of hearings. There's been representation case hearings, which I'm not directly involved in. There's been at least ten around the country over Zoom. I don't have the exact number.

But I simply wanted to point out the information that's out there about these cases and how they've run, and how they're able to run both with document heavy cases, witness testimony cases with a lot of witnesses, and that it has -- they have been done for that purpose. So again, just providing the information.

But I would defer back to Your Honor if you want me to create a breakout room for folks or --

JUDGE SOTOLONGO: Well, I just -- well, I just -- I hadn't realized that Mr. Grimaldi and Ms. Bononno are next to each other. So they can just turn their video and their audio off, and they can chat, and then come back on board when they're ready to do so. Is that --

MS. BONONNO: Okay.

JUDGE SOTOLONGO: Is that acceptable?

MS. BONONNO: Yes, Your Honor. Thank you.

JUDGE SOTOLONGO: All right.

MR. MORRISON: Mr. Eskenazi, can you put Ms. McBride --

JUDGE SOTOLONGO: Let's go --

MR. MORRISON: -- and myself into a private chat?

MR. ESKENAZI: Sure. I'll do that right now.

MR. MORRISON: Thank you.

JUDGE SOTOLONGO: All right. And then we're just going to take a five-minute break or ten-minute break as long as Mr. Grimaldi and Ms. Bononno need for this. So I'll stay -- I'll stay on the screen, but we're just taking a break until Mr. Grimaldi and Ms. Bononno return.

MR. MORRISON: Your Honor, are we on the record or are they already out in the break room?

JUDGE SOTOLONGO: They're already out in the break room. So we're going off the record at this point. So Bruce --

MR. MORRISON: Oh, okay.

JUDGE SOTOLONGO: -- we're -- we're off the record.

(Off the record at 9:27 a.m.)

JUDGE SOTOLONGO: All right. So the ball is in your court, Mr. Grimaldi and Ms. Bononno.

THE COURT REPORTER: Do you want to go back on the record?

JUDGE SOTOLONGO: Oh, yes, sorry. Let's go back on the record. Thank you, Bruce.

THE COURT REPORTER: All right. We're ready to go.

MR. GRIMALDI: Thank you, Your Honor. So as an initial matter just from a scheduling perspective, I am not available on the -- the week of the 17th. My schedule is scheduled out

at this point through September. So that will make it difficult to continue this hearing from that perspective.

We have conferred with our client and from -- they strongly believe that they're going to be prejudiced by continuing the hearing and that there's a due process issue as well -- by not continuing the hearing -- excuse me, by holding the hearing via Zoom now.

And a couple of things I just want to add. While we very much appreciate everything that Mr. Eskenazi has done, I believe it highly inappropriate that he made the remarks that he made relative to other hearings. In a sense, it's advocating a position. We would ask that those remarks be stricken from the record as an initial matter.

Secondly, I know the General Counsel, Mr. Morrison, suggested that one of his witnesses is retiring and that would make this difficult. Well, we, too, have had a witness retire and asked the witness to come and participate. So that, I don't think, should be any sort of hindrance.

Again from -- and as a third matter, even as we sit here, we see faces and numbers, and names pop up that we want to interrupt and frankly, will and ask who that is as we go along.

Now, I understand that the public can participate, that many times in Board trials we see, you know, members and staff members of the Board come in to observe, and it's easy when you're in the same room to ask who that is. It gets addressed

and you move on. Again, I believe that's something that becomes a hindrance during this process.

And then with regard to the documents and continuing introduction, I'm going to let you jump in again on that.

MS. BONONNO: Sure. So Your Honor, and we appreciate the offer of the extra time, but it isn't --

MR. GRIMALDI: Very much.

MS. BONONNO: It isn't that we can't do it and we worked hard to try to do it as ordered. It's that, you know, some of these bookmarks, you know, is 500, multiple hundreds of pages. And so it's just having to do it that way with the virtual exhibits in and of itself. So extra time isn't going to help with that.

MR. GRIMALDI: Yeah, and I don't mean to interrupt, but there is one bookmark that I believe has 500 separate pages in a single bookmark and they are all different exhibits to be introduced. So it's very unwieldy given the numbers of exhibits, the complexity, the numbers of allegations.

The new issue that the General Counsel raised, which not to conflate arguments, but therein, again, we would be entitled to time to -- we would be entitled to time to answer that complaint in and of itself. That would delay this.

JUDGE SOTOLONGO: All right. Let me -- let me address your remarks. First of all, Mr. Grimaldi, regarding Mr. Eskenazi's comments, I have no problem striking them from the

record. I don't think they're inappropriate. He was trying to be helpful.

MR. GRIMALDI: I agree.

JUDGE SOTOLONGO: And he --

MR. GRIMALDI: I certainly agree.

JUDGE SOTOLONGO: And to point out that, in fact, we have had other lengthy hearings involving many documents and those have been handled. And in other words, he was just trying to say this is doable. If the objection was totally a technical one, he was trying to make the point that this is doable.

However, I understand -- I understand your -- your objections, especially having to do with due process. So let me say this. So here is what the procedure will be. If you object -- my ruling will be to continue -- my ruling is to continue the hearing via Zoom.

Now, what you can do then, Mr. Grimaldi, you can say we want to take an appeal to the Board. And if you do, then obviously, I'll have to postpone the hearing so we're back to square one. So essentially, that's what's going to happen here. You're going to take -- obviously, you need to make a written -- a special appeal to the Board. The General Counsel and the Charging Party Union will have the opportunity to respond to your motion to the Board.

There are, I think, at least two or three cases currently pending before the Board on exactly the same issue. So we're

going to get one ruling, perhaps -- but then, again, maybe each case is -- you know, it's (indiscernible). So what might be appropriate in one case, may not be appropriate in the other as far as Zoom is concerned.

So you've got -- is that what you -- is that what you intend to do, Mr. Grimaldi, enter an appeal to the Board?

MR. GRIMALDI: Yes.

JUDGE SOTOLONGO: All right. Well, I have -- in those circumstances, then, I have no -- no choice but to grant the postponement in order to let the Board rule in this matter.

Now, I have to say that we -- there's going to be a lot of disappointed people. We sold a lot of ringside seats to this event and we're going to have to issue a lot of refunds, but -- no, I'm just joking, but that's just the way it is. We are all -- like I said, we are all here in Tara Comeda (phonetic). This is all new to us.

And eventually, the Board -- I think the Board, given the number of appeals that are being taken on this issue, will have to make a ruling. And I guess, they may have to make a ruling in each case because circumstances of each case is different.

But be that as it may, in light of Mr. Grimaldi's statement that he intends to appeal my ruling that we continue this case via Zoom, then I have no choice but to grant a postponement so that the Board can then rule on it.

Mr. Grimaldi, I would request that you file your appeal

with the Board by -- in the next two or three days, by week's end, certainly.

MR. GRIMALDI: Absolutely, Your Honor.

JUDGE SOTOLONGO: We need to get moving on this. And let me just say one thing. Mr. Harris had earlier said that they had no objection to the continuance. Obviously, Mr. Harris, you can address that in your -- whatever you're filing with the Board in response to Mr. Grimaldi's -- in response to the Respondent's filing.

However, you know, this -- I'll just say this. This case has been postponed three or four times, not through any fault of Respondent. Apparently, my understanding is that new charges has been filed. The Region would have to investigate those charges and eventually consolidate the charges into a new complaint -- in a complaint. But be that as it may, this case has now been pending for over a year and you know, the situation, the status quo -- the status quo may or may not be acceptable to some of the parties here. So we have to keep that in mind.

So in any event, in light -- in light of Mr. Grimaldi's position that he intends to file an interim appeal with the Board, then I have no choice but to postpone this proceeding. All right.

Is there any other statements from -- either from you, Mr. Morrison, or you, Mr. Harris, or from anybody else for that

matter? Starting with you, Mr. Morrison.

MR. MORRISON: Not on the record, Your Honor. We will address the arguments as to the appropriateness of your order to continue by Zoom and the appropriateness of Zoom, and address any arguments made by Respondent in brief. So I think that's fine. I don't think we need to add anything at this point on the record. Thank you.

JUDGE SOTOLONGO: All right. And I just -- just to make it clear, my -- my ruling is based on the fact that I think technically it is doable. I'm not obviously -- I would have to consider the due process objections more carefully. But at this point, I don't think that those are -- I believe those are addressable and -- but in any event, it will be up to the Board to make a ruling.

Mr. Morrison -- excuse me, Mr. Grimaldi, obviously, please file this appeal with the Board as soon as possible. I hope that you do it before the end of the week so we can get moving on this.

MR. GRIMALDI: You have our --

JUDGE SOTOLONGO: All right.

MR. GRIMALDI: You have our commitment, Your Honor.

JUDGE SOTOLONGO: Very well.

MR. ESKENAZI: Your Honor, can I just be heard on one -- one point, please?

JUDGE SOTOLONGO: Sure.

MR. ESKENAZI: I would just say, you know, very quickly that, you know, I understand Mr. Grimaldi's point regarding the information I provided. You know, I just want to say that I provided information purely as a technical matter as to what's been going on in different hearings and zero disrespect or zero advocacy was intended at all by the information I provided, whether to hold the hearing by Zoom, whether not to hold the hearing by Zoom, when to hold the hearing by Zoom, et cetera.

So zero disrespect was intended by that. I was purely trying to provide information. And you know, just to you, Mr. Grimaldi, all the parties here, you know, that's really my purpose. I'm not advocating on any -- any issue or any side on anything. It's just purely information, providing information.

MR. GRIMALDI: And thank you, Mr. Eskenazi. And I'll just make it clear one more time that we absolutely appreciate all the help you have offered during the process.

JUDGE SOTOLONGO: All right. Thank you very much all of you. To all our participants and observers, thank you for joining us today. I hope that you will join us in the future in other -- whether in this hearing or other hearings. I think this is, like I said, a great adventure, to say the least. Thank you all again and we will await the Board's ruling on this matter.

MR. MORRISON: Very good.

MR. GRIMALDI: Thank you, Your Honor.

MR. HARRIS: Thank you, Your Honor.

MS. BONONNO: Thank you, Your Honor.

(Whereupon, the hearing in the above-entitled matter was closed at 9:46 a.m.)

C E R T I F I C A T I O N

This is to certify that the attached proceedings before the National Labor Relations Board (NLRB), Region 19, Case Numbers 19-CA-230472, 19-CA-237336, 19-CA-237499, 19-CA-238503, 19-CA-248391, 19-CA-232728, Oxarc, Inc. and Teamsters Local 690, International Brotherhood of Teamsters and Jared Foster, at the 901 Market Street, Suite 300, San Francisco, California 94103, on August 3, 2020, at 9:06 a.m. was held according to the record, and that this is the original, complete, and true and accurate transcript that has been compared to the reporting or recording, accomplished at the hearing, that the exhibit files have been checked for completeness and no exhibits received in evidence or in the rejected exhibit files are missing.

BRUCE CARLSON

Official Reporter

Exhibit Y

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

McDONALD'S USA, LLC, A JOINT EMPLOYER, et al.

Cases 02-CA-093893, et al.
and 04-CA-125567, et al.

FAST FOOD WORKERS COMMITTEE AND SERVICE EMPLOYEES INTERNATIONAL UNION, CTW, CLC, et al.

McDONALD'S USA, LLC'S SPECIAL APPEAL FROM THE ADMINISTRATIVE LAW JUDGE'S JULY 17, 2018 ORDER DENYING MOTIONS TO APPROVE SETTLEMENT AGREEMENTS

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INTRODUCTION

McDonald's USA, LLC's[1] Special Appeal presents the only question that should have guided the Administrative Law Judge below: whether the settlement in this case satisfies *Independent Stave*. The controlling *Independent Stave* standards allow parties to "accept a compromise rather than risk receiving nothing or being required to provide a greater remedy." *Independent Stave Co.*, 287 NLRB 740, 742 (1987); *see also id.* at 741 (recognizing the Board's "longstanding policy of encouraging the peaceful, nonlitigous resolution of disputes") (internal cites and quotes omitted). Applying them, the Board approves all reasonable settlements, considering factors such as the risk of litigation and expected length of remaining proceedings. *See id.* at 742 (rejecting the presumption that "the General Counsel would prevail on *every* violation alleged in the complaint coupled with [the] requirement that the settlement agreement must remedy *every* violation alleged").

This case is more than ripe for settlement. There simply is no case like this one, substantively or procedurally, which exponentially increases the risks of litigation and the expected length of the remaining proceedings. On the merits, this case involves an unprecedented claim that McDonald's USA is liable as a joint employer and an unprecedented attempt to change the law on joint employment, thereby guaranteeing appellate review. In the

[1] Hereinafter, "McDonald's USA" or "the Company."

60-plus years that McDonald's USA has franchised restaurants, neither the Board[2] nor the Courts[3] have found the Company to be a joint employer under *any* standard.[4]

Procedurally, this case involves the largest consolidation of substantive unfair labor practice claims in the 80-plus year history of the Act. It has been vigorously contested, and the Board has recognized that it "could last for decades" should it "proceed all the way to finality." *UPMC*, 365 NLRB No. 153 at *5 n.7 (2017). The outcome of this case remains highly uncertain. The Charged Franchisees have strongly denied the substantive claims against them. Even to the extent the Board were to find liability, a Court of Appeals could well deny enforcement based upon administrative delay alone. *See, e.g.*, *Emhard Indus. v. NLRB*, 907 F.2d 372, 379 (2nd Cir. 1990) (refusing to enforce due to the lengthy "passage of time between the company's action and the board's remedy"). Further, the Administrative Law Judge made multiple, egregious errors in trial rulings throughout the matter. This tendency would likely continue unabated absent settlement, casting even more doubt as to the advisability of continuing this matter. *See, e.g.*, *McDonald's USA, LLC*, 362 NLRB No. 168, at *1 (2015) (Miscimarra,

[2] *Compare Love's Barbeque Rest. No. 62*, 245 NLRB 78 (1978), *enf'd. in rel. part,* 640 F.2d 1094 (9th Cir. 1981); *cf. also Christopher v. SmithKline Beecham Corp*., 567 U.S. 142, 158 (2012) (applying no deference where an agency's "announcement of its interpretation [was] preceded by a very lengthy period of conspicuous inaction"); *Dong Yi v. Sterling Collision Centers, Inc.*, 480 F.3d 505, 510-511 (7th Cir. 2007) (noting that while it may be "possible for an entire industry to be in violation of [a statute] for a long time without the [enforcing agency] noticing," the "more plausible hypothesis" is that the statute does not prohibit the practice at issue).

[3] *See, e.g*., *Ochoa v. McDonald's USA, LLC,* 133 F. Supp. 3d 1228, 1241 (N.D. Cal. 2015); *Evans v. McDonald's Corp.*, 936 F.2d 1087, 1089-90 (10th Cir. 1991); *Cropp v. Golden Arch Realty Corp.*, No. 2:08-cv-96, at 18 (D.S.C. March 30, 2009); *Mosley v. McDonald's Corp.*, No. 05-CV-7290 (N.D. Ill. Dec. 06, 2006); *Alberter v. McDonald's Corp*., 70 F. Supp. 2d 1138, 1144 (D. Nev. 1999); *Dotson v. McDonald's Corp.*, 1998 U.S. Dist. LEXIS 4676, at *8-9 (N.D. Ill. Mar. 31, 1998); *Kennedy v. McDonald's Corp*., 610 F. Supp. 203, 205 (S.D.W.Va. 1985); *Whitfield v. McDonald's,* No. 08-118582-NO (Mich. Cir. Ct. July 28, 2010); *Hall v. McDonald's Corp*., No. 84-270803 (Mich. Cir. Ct. June 22, 1986).

[4] Presently, the Board is "considering rulemaking to address the standard for determining joint-employer status under the National Labor Relations Act." *See* https://www.nlrb.gov/news-outreach/news-story/nlrb-considering-rulemaking-address-joint-employer-standard (last visited August 13, 2018). As such, even if the General Counsel were someday to obtain a joint employment finding against McDonald's USA under existing standards – which itself is highly uncertain – there is a substantial risk that the finding would have minimal precedential value underscoring the reasonableness of resolving this matter now.

dissenting) (warning that this case could be reversed based on procedural issues alone, wasting "years of litigation" in this "large consolidated case").

Against this backdrop, the settlement presented here is more than reasonable. It provides immediate, certain, and complete relief on all substantive allegations in the underlying complaints. This relief mirrors what the General Counsel would hope to obtain if he ultimately prevailed on all his substantive allegations – robust notice postings and full monetary remedies for all alleged discriminatees. The settlement does not ask McDonald's USA to admit joint employer status or otherwise act as if it were a joint employer. (If that were the General Counsel's demand, there would have been no settlement.) As a compromise, though, it requires the Company to take meaningful action to help ensure that the Charged Franchisees – the entities accused of violating the Act – meet their obligations. This settlement fully satisfies *Independent Stave*, and the Board should approve it.

The Administrative Law Judge believes otherwise, but her findings were flawed in multiple respects. For example, as the Courts of Appeals have repeatedly recognized, it is clear reversible error for an agency decisionmaker to purport to claim adherence to controlling precedent while actually applying different standards to achieve a desired result.[5] That is exactly what happened below. The Judge invoked *Independent Stave*, conceding that the settlement satisfies two prongs of its test. Nevertheless, the Judge failed to assess whether the parties' compromise is reasonable under *Independent Stave* under the circumstances presented. Instead,

[5] *See, e.g.*, *MikLin Enters., Inc. v. NLRB*, 861 F.3d 812, 821 (8th Cir. 2017) (noting that the underlying decision "purport[ed] to apply" controlling precedent but "migrated to a severely constrained interpretation of that decision"); *Constellation Brands, U.S. Operations, Inc. v. NLRB*, 842 F.3d 784, 795 (2d Cir. 2016) (remanding where regional director "merely recit[ed]" applicable standards without performing the required analysis); *Local Joint Exec. Bd. of Las Vegas v. NLRB*, 657 F.3d 865, 871 (9th Cir. 2011) (rejecting "attempt to veil . . . argument in procedural formalities"); *Lee Lumber & Bldg. Material Corp. v. NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997) (finding assertion that the agency applied controlling precedent "disingenuous"); *In re Bildisco*, 682 F.2d 72, 79 (3d Cir. 1982) (concluding that while the decisionmakers "purport[ed] to follow the rule," they "replace[d]" it with one of their own making), *aff'd sub nom. NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984).

the Judge gave controlling weight to whether the settlement "approximate[s] the remedial effect of a finding of joint employer status." Order at 20.[6] That is completely contrary to prevailing law. In *Independent Stave* itself, the Board rejected the Judge's brand of full-remedy analysis. *See* 287 NLRB at 742-43 ("By operating on a rigid requirement that the settlement must mirror a full remedy, we would be ignoring the realities of litigation."). And while in recent years the Agency briefly applied a full-remedy test,[7] the Board has since expressly rejected that counterproductive form of analysis. *See UMPC*, 365 NLRB No. 153 at *4 (2017) (reinstating *Independent Stave*, calling full-remedy "an ill-advised standard less likely to effectuate the purposes of the Act than the Board's longstanding approach."). Perhaps the Administrative Law Judge preferred the inapposite full-remedy standard. But, the Judge's assessment of the settlement under an incorrect standard – albeit under the guise of applying *Independent Stave* – warrants reversal standing alone.

The Judge made a similar mistake in insisting that settlements in joint employment cases must include a specific term: a performance guarantee by the alleged joint employer. *See* Order at 23 (citing *UPMC*, 365 NLRB No. 153 at *8, noting that "there is no guarantee by McDonald's of the Franchisee Respondent[s'] performance whatsoever"). *UPMC* and *Independent Stave* do not establish bright line *rules* for the content of settlement agreements. Instead, they prescribe multi-factor *standards* by which the Board assesses the reasonableness of the parties' compromise. This direction from the Board was deliberate, and it was plain error for the Judge to contend otherwise. *See Independent Stave*, 287 NLRB at 743 ("It is, of course, impossible to anticipate each and every factor which will have relevance to our review of non-Board settlement

[6] The Judge's July 17, 2018 Order Denying Motions to Approve Settlement Agreements (hereinafter, "Order") is attached as Exhibit ("Ex.") 1.

[7] *See U.S. Postal Serv.*, 364 NLRB No. 116 (2016), *overruled by UMPC*, 365 NLRB No. 153 at *4 (2017).

agreements."); *cf*. Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process 139-41 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (1958) ("Many legal arrangements cannot feasibly be cast in the form of a rule, however inchoate. And often another form is deliberately chosen.").

The Judge's misreading of *UPMC* as requiring a guarantee is particularly incongruous on the facts presented. The settlement that the Court rejected here is objectively better than the one the Board approved in *UPMC*, which provided no substantive relief whatsoever. Further, the Judge's misreading embodies the very leap in logic that the Board criticized in *UPMC*. There, the Board not only reaffirmed *Independent Stave*, it rejected the notion that the Agency had ever applied a full-remedy standard before 2016. In *UPMC*, the Board specifically rejected the assertion that *Local 201, Elec. Workers (General Electric)*, 188 NLRB 855 (1971) set out a full-remedy test. The *UPMC* Board noted that *General Electric* had merely affirmed as reasonable a settlement that provided a full remedy – it never stated that the Agency "would *only* approve . . . settlement agreements that provide a full remedy." *UMPC,* 365 NLRB No. 153 at *6 (noting that "a high jumper [who] clears the bar by a foot would also clear it if he had jumped 6 inches lower"). Just as *General Electric* never held that all future settlements must provide full relief, *UPMC* – in reinstating the *Independent Stave* reasonableness standard – did not hold that a guarantee now is required in any future class of settlements. The Judge read *UPMC* as setting the bar for joint employer settlements at the level of a guarantee. There is no such thing. And the reasoning the Court relied upon in this regard was specifically rejected in *UPMC* in favor of a return to the *Independent Stave* factors.

These were by no means the Administrative Law Judge's only errors, and arguably not even her worst. The Judge's assertion, Order at 37, that the parties were "literally days before

the close of the monumental record in this case" has no basis in reality. As this Board previously noted, absent settlement, this case "could last for decades." *UPMC*, 365 NLRB No. 153 at *5 n.7. The same is true of the Judge's contrived "significant doubt" as to whether the signatories "actually reached agreement." Order at 2. Likewise, the Judge's insistence, *id.* at 39, that the General Counsel spend additional years chasing what she perceives as the "case's ultimate purpose" – at the expense of the alleged discriminatees, all substantive remedies, the parties, and taxpayer dollars ("not a compelling counterweight") – reflects a fatal failure to accept the differences between her role and the role of the General Counsel. All this, along with the Judge's digressions into entirely irrelevant matters (including her lengthy, highly one-sided recitation of the supposed procedural history of the case and her evident disappointment that the former General Counsel never charged McDonald's USA with violating the Act), raise serious questions as to the Judge's impartiality. *See Independent Stave*, 287 NLRB at 741 ("settlements constitute the 'life blood' of the administrative process"); 29 U.S.C. § 153(d) (providing that the General Counsel has "final authority . . . in respect of the prosecution of . . . complaints before the Board").

The issue presented, however, is not so much the magnitude of the Administrative Law Judge's errors, but whether the settlement satisfies *Independent Stave*. Indeed, if this settlement, which provides full make-whole relief and otherwise provides remedies over and above that which the General Counsel could achieve in litigation is unreasonable, then no party – employer, labor organization, individual – could ever be confident that any settlement with the General Counsel would be acceptable to an administrative law judge. The settlement is reasonable, the Board should approve it, and this litigation should finally end.

BACKGROUND

A. The Charges And Complaints

In fall 2012, Charging Parties launched a nationwide "Fight for $15" campaign. The campaign included protests in support of demands that federal, state, and local governments increase the statutory minimum wage, as well as demands that employers in the quick service restaurant industry increase wages to at least $15 per hour regardless of statutory minimums. The campaign also involved direct attacks on the McDonald's brand, including the publication of dubious studies created by SEIU-funded consultants and various other tactics designed to harm the brand's pubic image and good will.

In December 2012, the SEIU and its affiliates began filing charges against certain McDonald's franchisees, generally alleging minor violations of the Act. Many of the charges included allegations that McDonald's USA is vicariously liable as a joint employer. In late 2014, the former General Counsel issued a number of complaints. He never alleged that the Company violated the Act, only that it was liable as a joint employer. *See* General Counsel's Motion for an Order Requiring Immediate Production of Certain Documents (hereinafter, "General Counsel 4/26/16 Motion"), at 20 ("McDonald's, by contrast, is not accused of having committed any unfair labor practices: Its liability here would be vicarious, as opposed to the direct liability the franchisees face."), attached as Ex. 2.

At the time of the Complaints, application of NLRA joint employment law in the franchisor/franchisee context had been settled for decades. *See, e.g.*, *Love's Barbeque Rest. No. 62*, 245 NLRB 78 (1978), *enf'd. in rel. part*, 640 F.2d 1094 (9th Cir. 1981). Nevertheless, the former General Counsel brought the case as a vehicle to change joint employment law. *See* Tr.

21254:12-16 (noting the objective "to update Joint Employer law within the Board context").[8] There has never been a contention in this case, nor could there be, that a joint employment finding would add to the potential substantive relief. To the contrary, the Charging Parties never sought a bargaining order against McDonald's USA. *See* Tr. 21253:21-21254:1 (noting that the Agency "has never sought an order in this case requiring that McDonald's and the Franchisee Respondents have an obligation to bargain with the Charging Party Union"); Tr. 21300:25-21301:10 (similar concession from Charging Parties).

B. The Extended Litigation

With the joint employment allegations serving as the roadblock to settlement, formal proceedings began. The Administrative Law Judge asserts that those proceedings were marked by a "history of antagonism" and "ceaseless objections and procedural objections and florid motion practice." Order at 2 (arguing that the case's procedural history is a reason to deny settlement). Unsurprisingly, the matter was hard fought, like any major litigation. Unfortunately, the Judge's case management decisions were rife with error as often as not. *See, e.g.*, *McDonald's USA, LLC*, Case No. 02-CA-093893, NLRB Order at *2 (Order Jan. 16, 2018)[9] (holding unanimously that "the judge abused her discretion in requiring an unwarranted discovery procedure"). The Judge's continued missteps[10] thus needlessly served to extend the matter, exacerbate points of contention, and increase the risk of appellate reversal of any decision she may ultimately render.

[8] All excerpts from the trial transcript are attached as Ex. 3.

[9] Available at https://www.nlrb.gov/cases-decisions/unpublished-board-decisions.

[10] McDonald's USA has no intention of detailing each of the Administrative Law Judge's material missteps during the proceedings. The Company reserves the right to raise exceptions regarding those errors in further proceedings as necessary if the Board withholds settlement approval.

That said, the parties reached any number of mutually-agreed stipulations[11] throughout this matter, many in hopes of limiting the damage resulting from the Judge's errors. For example, over McDonald's USA's objection, the Judge consolidated 71 unfair labor practice charges, alleging 176 separate violations of the Act against 30 different independent franchisees located across the country and McDonald's USA as a putative joint employer. *See* ALJ's Order Denying Respondents' Motions to Sever (Feb. 19, 2015), attached as Ex. 10. This was perhaps the largest consolidation in NLRB history. To attempt to manage it, the Judge then instituted an unprecedented Case Management Plan under which proceedings would begin in New York, travel to Chicago, move to Los Angeles, and then return to New York. *See* ALJ's Case Management Order, at 8 (Mar. 3, 2015), attached as Ex. 11. Parties located outside the Region where the Judge was live at the time would participate by videoconference, making arguments and objections, questioning witnesses, and interacting with the Judge and other parties remotely. *Id.* at 10. Remote parties would present exhibits over the internet. *Id.*

McDonald's USA objected that the consolidation and attendant trial procedures would never work – and the Judge continues to criticize the Company for those objections, *see* Order at 4-7, despite the inconvertible evidence demonstrating that its concerns were wholly justified. *See, e.g.*, McDonald's USA, LLC's Motion to Sever (Jan. 15, 2015) ("[T]he logistical challenges

[11] *See, e.g.,* ALJ Order Approving Stipulation Between McDonald's USA, LLC, Respondent Franchisees, the Charging Parties, and General Counsel of the National Labor Relations Board as to Modification of the Case Management Order (Mar. 14, 2016), attached as Ex. 4; ALJ Order Approving Stipulation Between McDonald's USA, LLC and General Counsel of the National Labor Relations Board as to the Authenticity of Certain Documents (Mar. 17, 2016), attached as Ex. 5; ALJ Order Approving Stipulation Between McDonald's USA, LLC and General Counsel of the National Labor Relations Board as to an Exception to the Rule Against Hearsay for Certain Documents (Mar. 29, 2016), attached as Ex. 6; ALJ Order Approving Stipulation Between McDonald's USA, LLC and General Counsel of the National Labor Relations Board as to the Admissibility of Certain Documents (May 25, 2016), attached as Ex. 7; ALJ Order Approving Stipulation Between McDonald's USA, LLC and the General Counsel Regarding Transcript Amendments (Sep. 12, 2016), attached as Ex. 8; ALJ Order Approving Stipulation Between McDonald's USA, LLC and General Counsel of the National Labor Relations Board as to the Admissibility of Certain Documents (June 21, 2016), attached as Ex. 9.

of consolidation would almost certainly cause the hearing in this case to go on for years."), attached as Ex. 12. In particular, during trial runs, McDonald's USA *and* the General Counsel agreed that effective remote participation by Charged Franchisees was impossible because the videoconferencing and internet systems at the courthouse were not up to the herculean task ordered by the Judge.[12] So, just days before opening statements, McDonald's USA, the General Counsel, the Charged Franchisees, and Charging Parties reached a stipulation that eliminated the need for remote participation. *See* ALJ Order Approving Stipulation Between McDonald's USA, LLC, Respondent Franchisees, the Charging Parties, and General Counsel of the National Labor Relations Board as to Modification of the Case Management Order (Mar. 14 2016), attached as Ex. 4. Under the stipulation, remote Parties could raise written, deferred objections to any testimony or evidence after reviewing transcripts of the proceedings making unnecessary trial by videoconference. *Id.* at 4.

The General Counsel's case-in-chief began in March 2016, but by the fall of that year he had not presented a single merits witness. At that point, McDonald's USA and the General Counsel reached an agreement to sever certain cases. *See* ALJ's Order Severing Cases and Approving Stipulation, at 5 (Oct. 12, 2016) ("[The parties' estimates of hearing times] lead to the conclusion that hearing of all of the consolidated cases together is impossible"), attached as Ex. 14. The stipulation called for the severance of the complaints in Regions 13, 20, 25 and 31

[12] *See, e.g.*, McDonald's USA, LLC's Motion to Sever Due to Technological Difficulties (Feb. 25, 2016) at 12 (citing Tr. 612:1-613:1) (counsel in a remote location stating, "I cannot see you, Your Honor. I cannot see the witness stand . . . . I cannot see faces . . . . If I were examining a witness, I would not be in a position to do so effectively because I can't read their body language. I can't see their. . . I can't see their facial expressions."); *id.* at 12-13 (citing Tr. 616:4-12) (counsel in remote location noting that he could not see counsel in Region 2 because they appeared as "Lilliputians . . . little ants on the screen"); *id.* at 13 (citing Tr. 825:19-25) (Counsel for the General Counsel noting that the "small desktop monitors that we have in the courtroom here are blinking . . . [due to] a hardware failure . . . ."); *id.* at 14 (citing Tr. 638:23-639:1) (counsel in remote location stating that the sound feed was "cutting in and out"); *id.* at 5 (citing Tr. 543:8-14) (counsel in Region 2 unable to connect to General Counsel-provided internet to exchange exhibits); *id.* at 6 (citing Tr. 575:1-5) (counsel in remote Regions unable to connect to General Counsel-provided internet to exchange exhibits), attached as Ex. 13.

("Severed Cases")[13] from the complaints in Regions 2 and 4 ("the New York and Philadelphia Cases").[14] *See id.* at 5. The Judge's continuing protests about the Company's objections to the structure of the trial are not only difficult to fathom, but entirely at odds with her own October 12, 2016 order.

The Court then placed the Severed Cases – two-thirds of the total consolidated cases – in abeyance pending a Board decision on the New York and Philadelphia Cases.[15] *See id.* at 6. The New York and Philadelphia Cases, however, continued before the Administrative Law Judge. To date, the proceedings in those matters have generated 142 hearing days, 123 witnesses, 3,035 admitted exhibits, and 21,190 transcript pages. The General Counsel alone presented 86 witnesses over 102 hearing days before resting on May 23, 2017. *See* Order at 10. McDonald's USA, which began its affirmative case on October 30, 2017, presented 15 witnesses over 14 trial days when the hearing adjourned on December 13, 2017. *See* Order at 11, 37.

If this matter proceeds, and after the record in the New York and Philadelphia Cases finally closes, the Charged Franchisees in the Severed Cases will have 20 days to submit

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[13] The "Severed Cases" are Case Nos. 13-CA-106490; 13-CA-106491; 13-CA-124812; 13-CA-131143; 13-CA-106493; 13-CA-131141; 13-CA-107668; 13-CA-113837; 13-CA-115647; 13-CA-119015; 13-CA-123916; 13-CA-124813; 13-CA-131440; 13-CA-118690; 13-CA-123699; 13-CA-129771; 13-CA-124213; 13-CA-129709; 13-CA-131145; 13-CA-117083; 13-CA-118691; 13-CA-121759; 20-CA-132103; 20-CA-135947; 20-CA-135979; 20-CA-137264; 25-CA-114819; 25-CA-114915; 25-CA-130734; 25-CA-130746; 31-CA-127447; 31-CA-130085; 31-CA-130090; 31-CA-132489; 31-CA-135529; 31-CA-135590; 31-CA-128483; 31-CA-129024; 31-CA-129027; 31-CA-133117; 31-CA-129024; 31-CA-130239; 31-CA-131697; 31-CA-132913; 31-CA-132915; 31-CA-134473; 31-CA-134474; 31-CA-134478; 31-CA-134479; 31-CA-134514; 31-CA-134480; 31-CA-135729; 31-CA-137102; 31-CA-137150; 31-CA-129982; and 31-CA-134237.

[14] The "New York and Philadelphia Cases" are Case Nos. 02-CA-093893; 02-CA-098662; 02-CA-093895; 02-CA-097827; 02-CA-093927; 02-CA-098659; 02-CA-094224; 02-CA-098676; 02-CA-094679; 02-CA-098604; 02-CA-103771; 02-CA-112282; 02-CA-098009; 02-CA-103384; 02-CA-103726; 02-CA-106094; 04-CA-125567; 04-CA-129783; and 04-CA-133621.

[15] The New York and Philadelphia Case and the Severed Cases are not the only ones at issue. Various Regions issued complaints on over 80 other unfair labor practice charges filed against McDonald's franchisees who are not parties here. Those "Abeyance Cases" were all held indefinitely pending the outcome of the cases here. At this point, however, the Charging Parties have withdrawn the joint employer allegations in all but four of the Abeyance Cases. Based on representations from Counsel for the General Counsel, McDonald's USA expects that the settlement here will be the template for settlement in the few remaining Abeyance Cases where McDonald's USA is still a party alleged to be a joint employer.

deferred objections, and the General Counsel will have ten business days to respond. *See* ALJ Order on Time for Submission of Deferred Objections (Jan 18, 2017), attached as Ex. 15. After the Judge rules on the deferred objections, which likely will be voluminous given the size of the record, the parties would begin post-hearing briefing in the New York and Philadelphia cases. Counsel for the General Counsel has moved for six months to file opening post-hearing briefs. *See* General Counsel's Request For An Extension Of Time To File Briefs To Administrative Law Judge Lauren Esposito (Jan. 12, 2018), attached as Ex. 16. As such, even if the New York and Philadelphia cases were to resume today, it is unlikely that they would be fully briefed to the Administrative Law Judge before well into 2019. Once the Judge issues a decision, the New York and Philadelphia cases are all but certain to be appealed to the Board, and then the Circuit Court of Appeals, who may remand them to the Board at any time. If, after all of that, the New York and Philadelphia alleged discriminatees are awarded relief, there remains the possibility of compliance hearings.

Even that, however, would not resolve the more than 50 Severed Cases, which are even farther from completion. There, the General Counsel has not put on a single witness regarding the merits allegations, nor have the Charged Franchisees put on any rebuttal witnesses. Assuming an average of even three witnesses per Severed Case, there would be then 150 additional trial witnesses – all before years of briefing, exceptions and appeals. *See UPMC*, 365 NLRB No. 153, at *8 n.7 (noting that if the McDonald's litigation were to "proceed . . . to finality, [it] could last for decades").[16] The parties were "literally days before the close of the

[16] In her Order, the Administrative Law Judge asserted that the matter was near completion at the time of settlement. *See* Order at 37. As the foregoing makes clear beyond any question, that assertion is not only utterly at odds with the Board's prior statements, but also with any fair and objective assessment of the posture of this case.

monumental record in this case"? Order at 37. Perhaps the trial record in the New York and Philadelphia Cases, but obviously not the litigation in its entirety.

C. The Settlement Discussions

On December 8, 2017 – before the Board's issuance of its decision in *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (Dec. 14, 2017) – McDonald's USA contacted the General Counsel regarding the possibility of settlement without a concession on the joint employment issue.[17] Facing years of additional litigation, the General Counsel agreed to talk. On January 17, 2018, the General Counsel moved for a 60-day stay of proceedings to allow for settlement discussions.[18] The Administrative Law Judge agreed, urging the parties to use best efforts to resolve the matter:

> [I]t is my sincere hope that during the requested stay the parties will make an assiduous and good faith effort toward conclusively resolving this case, the severed cases, and the other pending charges involving McDonald's.

ALJ Order Granting General Counsel's Motion to Stay Proceedings, at 2 (Jan. 19, 2018), attached as Ex. 19.

During the stay, the General Counsel, McDonald's USA, and the Charged Franchisees engaged in extensive, arms-length, good-faith negotiations.[19] Charging Parties made a strategic decision to sit out the negotiations, although the General Counsel kept them apprised of the discussions. *See* Tr. 21201:21-23. McDonald's USA and the General Counsel focused on common terms for the agreements (such as the agreements' default provisions and non-

[17] *See* Letter from W. Goldsmith to P. Robb (Dec. 8, 2017), attached as Ex. 17.

[18] *See* General Counsel's Motion To Stay Proceedings (Jan. 17, 2017), attached as Ex. 18.

[19] McDonald's USA appreciates and commends the professionalism that Counsel for the General Counsel displayed during settlement discussions, particularly given the lengthy, difficult and hard-fought nature of the proceedings in this matter. Further, as indicated, McDonald's USA agrees with the General Counsel's thorough and accurate presentation regarding the settlement agreements at the April 5, 2018 hearing. *See* Tr. 21259:6-16; *see also* Tr. 21237:12-21258:23.

admissions clause), while the Charged Franchisees and the General Counsel focused on remedial issues (such as language of the notice postings and backpay amounts). In short, and as the Judge ordered, the General Counsel, McDonald's USA, and Charged Franchisees made an "assiduous and good faith effort toward conclusively resolving" the entirety of this matter. The result of this process are the settlement agreements[20] now before the Board.

D. The Settlement Agreements

The settlement agreements globally resolve the New York and Philadelphia Cases, as well as the Severed Cases.[21] They settle all substantive unfair labor practice claims and claims that McDonald's USA is a joint employer with the respective Charged Franchisees. *See* GC.Ex.Settlement 1-30, attached as Exs. 20-49. Each Charged Franchisee is party to a separate settlement agreement, and the General Counsel and McDonald's USA are parties to all. The Charging Parties have refused to sign any agreement.

The agreements are similarly structured, though each is tailored to the specific claims against the signatory Charged Franchisee. Each provides complete relief on the covered substantive claims. All agreements provide for robust notice posting. *See* GC.Ex.Settlement 1-30 (paragraph entitled "Posting and Mailing of Notice" and approved Notice), attached as Exs. 20-49. Each Charged Franchisee will post notices at the restaurants named in the cases pertaining to them, and, at their own expense, will mail notices to former employees who worked at those restaurants during a specified time frame. *See* GC.Ex.Settlement 1-30 (paragraph entitled "Posting and Mailing of Notice" and approved Notice), attached as Exs. 20-49. Further, to provide make-whole relief to alleged discriminatees, the agreements provide for full backpay

[20] The settlement agreements, admitted as GC.Ex.Settlement 1-30, are attached as Exs. 20-49.

[21] They also form the basis for settlement in the few remaining Abeyance Cases involving McDonald's USA. *See supra* at 11 n.15.

as calculated by the General Counsel, including excess tax and interest. *See* Order at 14; *see also* GC.Ex.Settlement 1-3, 5, 15, 16, 20, 22, 23, and 27-29 (paragraph entitled "Backpay"), attached as Exs. 20-22, 24, 25, 39, 41, 42, and 46-48. In addition, they provide that the three discriminatees[22] alleged to have been unlawfully terminated will receive front pay in lieu of reinstatement. *See* Order at 14; *see also* GC.Ex.Settlement 1, 2, and 3 ("Backpay"), attached as Exs. 20-22.[23] The Charged Franchisees have already provided to the Regions funds sufficient to cover these backpay obligations. *See* GC.Ex.Settlement 1 – 30 attached as Exs. 20-49.

The obligations of the Charged Franchisees are backed by several enforcement provisions. As an initial matter, each settlement agreement includes standard NLRB default language. In the event of an uncured breach by a Charged Franchisee, this language permits the General Counsel to seek default on the substantive unfair labor practice allegations against that entity. Though the Administrative Law Judge purported to find the settlement agreements complicated and confusing, Order at 27, the Judge understood them sufficiently to describe them clearly and correctly:

> [T]he Franchisee Respondent shall have fourteen days to remedy the violation [following notice]. In the event that the Franchisee Respondent fails to do so, the Regional Director may issue what the Settlement Agreements refer to as a 'Merits Complaint' against that Franchisee Respondent only, containing all of the allegations pertinent to the Franchisee Respondent in the instant case except for the allegations that McDonald's is a joint employer with the Franchisee Respondent of the Franchisee Respondent's employees.

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[22] The remaining "17 [discriminatees] were allegedly suspended for one day, assigned reduced work hours, and sent home early at various time . . . ." Order at 14.

[23] These alleged discriminatees have waived reinstatement. *See* Order at 14, 14 n.22; *see also* GC.Ex.Settlement 1 (statement in Notice that "Sean Caldwell . . . has waived reinstatement"), attached as Ex. 20; GC Exhibit Waiver 2 (Caldwell agreement "waiv[ing] . . . reinstatement" in exchange for frontpay), attached has Ex. 50; GC.Ex.Settlement 2 (statement in Notice that "Tracee Nash . . . has waived reinstatement"), attached as Ex. 21; GC Exhibit Waiver 1 (agreement by Tracee Nash that she "waive[d] . . . reinstatement" in exchange for frontpay), attached as Ex. 51; GC.Ex.Settlement 3 (statement in Notice that "Quanisha Dupree . . . has waived reinstatement"), attached as Ex. 22; GC Exhibit Waiver 3 (agreement by Quanisha Dupree that she "waive[d] . . . reinstatement" in exchange for frontpay), attached as Ex. 52.

> General Counsel may then file a motion for a default judgment with the Board on the allegations of the Merits Complaint.

Order at 15.

To help ensure franchisee compliance, the settlement agreements also contain additional mechanisms over and above the standard default language. For example, as the Administrative Law Judge noted, McDonald's USA has pledged to support franchisee compliance through the issuance of "Special Notices" in the event of an uncured breach by a Charged Franchisee. *See* Order at 15; *see also, e.g.*, GC.Ex.Settlement 1 (paragraph entitled "Performance" and Special Notice), attached as Ex 20. In the event of an uncured breach by a Charged Franchisee, McDonald's USA will mail Special Notices to the last known addresses of Charged Franchisee employees. *See id.* These Special Notices contain language agreed upon by McDonald's USA and the General Counsel, and they would inform recipients of the General Counsel's determination that the Charged Franchisee was in breach and of their general rights under the Act. *See id.*

Further, as the Judge also noted, the agreements "provide for a Settlement Fund of $250,000 contributed by the Franchisee Respondents." Order at 16 (quoting, *e.g.*, GC.Ex.Settlement 1 (paragraph entitled "Settlement Fund"), attached as Ex. 20). The fund is available "for the benefit of any and all potential discriminatees who may be entitled to a monetary remedy" as a result of a future Section 8(a)(3) violation by a Charged Franchisee that the General Counsel determines to be an uncured breach of a settlement agreement. *Id.* Payment from the fund would be triggered by McDonald's issuance of Special Notice. As the Judge once again clearly and correctly explained:

> If McDonald's notifies the Regional Director that it will issue a Special Notice . . . the alleged discriminate in question may choose between two options. The alleged dicriminatee may waive reinstatement and receive a payment from the Settlement Fund

> equal to 500 hours of pay plus backpay running from the date of the violation through the date that the Regional Director provides written notice of the breach. The alleged discriminatee may in the alternative elect to receive a payment from the Settlement Fund equal to the pay they would have earned form the date of the violation through the date of the Regional Director's written notice of the breach. If the alleged discriminatee elects to waive reinstatement, the payment from the Settlement Fund shall be in lieu of any other remedies, the charges will be dismissed, and General Counsel will take no further action. If the alleged discriminatee chooses not to waive reinstatement, General Counsel may issue a complaint [against the Charged Franchisee] based on the violation alleged, but will not pursue default proceedings against McDonald's based on the violations.

Order at 16. Under the terms of the agreements, McDonald's USA is responsible for collecting Charged Franchisees' contributions to the Settlement Fund and delivering them to the Regions. *See, e.g.*, GC.Ex.Settlement 1 (paragraph entitled "Settlement Fund"), attached as Ex. 20. The Company is also responsible for distributing the unused balance of the fund to the Charged Franchisees at the end of the settlement's compliance period. *Id.*

McDonald's USA is subject to default proceedings – on the joint employment allegations – if it breaches the settlement agreements by failing to comply with its Special Notice obligations. As the Administrative Law Judge correctly recognized:

> The Settlement Agreements . . . provide that if *both* McDonald's and the Franchisee Respondent fail to cure the breach of the Agreements identified by the Regional Director, the Regional Director may amend the Merits Complaint to include McDonald's as a Respondent and include the allegations pertinent to joint employer status. . . . General Counsel may file a motion for a default judgment with respect to its allegations.

Order at 15 (emphasis in original).

Finally, each agreement is clear that neither it nor any actions taken in connection with it are an admission of liability or joint employment status:

> Neither this Agreement nor any conduct taken in connection with this Agreement is an admission by the Charged Parties that they

> are or have ever been joint employers or liable under the Act, and shall not be considered, offered, or admitted as evidence of joint employer status between McDonald's USA, LLC and any of its franchisees.

See, e.g., GC.Ex.Settlement 1 (paragraph entitled "Settlement Fund"), attached as Ex. 20.

E. The Administrative Law Judge's Rejection Of The Settlement

On March 19, 2018, the General Counsel and McDonald's USA presented the settlement agreements to the Court for approval. *See* Tr. 21196:7-21200:18; 21211:11-21212:7; 21214:25-21216:5. At that hearing, Charging Parties stated preliminary objections to settlement, including an objection that alleged discriminatees did not understand the settlement and/or accepted only under duress. *See* Tr. 21200:23-21204:7. The Court scheduled an *Independent Stave* hearing for April 5, 2018 to allow Charging Parties to fully support their objections. *See* Tr. 21226:24-21227:5.

At the *Independent Stave* hearing, however, Charging Parties failed to present a single witness or introduce a single piece of evidence. Tr. 21236:12-14. Instead, they presented what amounted to an extended closing argument with their spin on the trial evidence presented to date. Tr. 21264:21-21302:12. The Judge ordered the Parties to brief their positions. *See* Tr. 21325:3-6. On July 17, 2018, after the receipt of briefs,[24] the Judge issued an Order denying settlement approval. Pursuant to the Judge's Order (at 40), given McDonald's USA's filing of this Request for Special Permission to Appeal within the 28 days directed by the Judge, additional trial days will not be scheduled.

[24] McDonald's USA, LLC's Supplemental Brief in Support of Its Motion to Approve Settlement Agreements (hereinafter, McD's 4/27/18 Supp. Br.) is attached as Ex. 53. General Counsel's Brief in Support of His Motion to Approve the Settlement Agreements (hereinafter, 4/27/18 GC. Br. at 9) is attached as Ex. 54.

ARGUMENT

A. The Settlement Agreements Satisfy *Independent Stave*

The Board has long recognized settlement as "the most effective means to: 1) improve relationships between the parties; 2) effectuate the purposes of the Act; and 3) permit the Agency to concentrate its limited resources on other cases by avoiding costly litigation expenses." NLRB Casehandling Manual (Part One), Settlements, § 10124.1 (2018). The Board settles an extraordinarily high percentage of cases. *See* NLRB, Performance & Accountability Report (FY2017), at 5 (statement of former General Counsel Griffin, reporting that "our settlement rate reached 95%," and that through these settlements "we were able not only to promote industrial peace, but also save taxpayer dollars"). Settlements may occur at any point in a matter. *See id.* at 40 ("Settlement efforts continue throughout the course of the litigation").

Here, because the record has opened, the settlement among the General Counsel, Charged Franchisees, and McDonald's USA requires Board approval. *See* NLRB Statements of Procedure, § 101.9(d). In evaluating the settlement, the Board "examines all the surrounding circumstances to determine whether the settlement is reasonable." *UPMC*, 365 NLRB No. 153 at *11 (2017) (citing *Independent Stave Co.*, 287 NLRB 740, 743 (1987)). Four factors are particularly relevant:

> (1) whether the charging parties, the respondents, and any of the individual discriminatee(s) have agreed to be bound, and the position taken by the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in the litigation, and the stage of the litigation; (3) whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes.

Independent Stave, 287 NLRB at 743. The settlement here more than satisfies each.

1. There is Substantial Agreement to Be Bound

The first *Independent Stave* factor weighs in favor of approval. *See Independent Stave*, 287 NLRB at 743 ("whether the charging parties, the respondents, and any of the individual discriminatee(s) have agreed to be bound, and the position taken by the General Counsel regarding the settlement"). All Charged Franchisees, McDonald's USA, and the General Counsel have agreed to be bound by the terms of the settlement agreements. *See* Exs. 18-47. Moreover, the three alleged discriminatees who elected frontpay in lieu of reinstatement have agreed to be bound. *See* Exs. 18-20, 48-50. Charging Parties failed to present a shred of evidence that other alleged discriminatees – who will receive full backpay under the terms of the agreement – are any less supportive of the settlement.

Charging Parties have refused to join the settlement agreements. Their refusal is no basis to deny approval to a reasonable settlement supported by all other parties. *See, e.g.*, *Southeast Stevedoring Corp.*, 2014 WL 2422492, at *1 n.1 (NLRB May 29, 2014) (rejecting charging party's objection that approval "after the Charging Party has litigated the case and submitted its post-hearing brief" would "unfairly deprive[] it of a decision"); *Group Health, Inc.*, 325 NLRB No. 49, at *3 (1998), *aff'd sub nom*, *Bloom v. NLRB*, 209 F.3d 1060 (8th Cir. 2000) (approving settlement agreement "although the Charging Party opposes"); *Shine Building Maint., Inc.*, 305 NLRB 478, at *1 (1991) (approving settlement that "will effectuate the purposes and policies of the Act" over the union's objection); *James Bros. Coal Co.*, 191 NLRB 209, 210 (1971) (rejecting charging party's objection because "[t]he only relevant question is whether this settlement . . . effectuates the policies of the Act."); *cf. UPMC*, 365 NLRB No. 153, at *12 (2017) (approving consent order noting that "Charging Party's opposition . . . is outweighed by countervailing factors").

2. The Settlement is Reasonable in Light of the Alleged Violations, Risk of Litigation, and Stage of the Case

The second *Independent Stave* factor also favors settlement. *See Independent Stave*, 287 NLRB at 743 ("whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in the litigation, and the stage of the litigation"). The substantive allegations in the New York and Philadelphia Cases and the Severed Cases involve entirely garden-variety violations of the Act – the vast majority of which are wholly remedied through Notice Postings. Of the 20 alleged discriminatees, only three were allegedly unlawfully terminated. The remaining "17 [discriminatees] were allegedly suspended for one day, assigned reduced work hours, and sent home early at various time . . . ." Order at 14. The settlement provides assured, complete relief on all substantive unfair labor practice claims in the New York and Philadelphia Cases and the Severed Cases. Additionally, it provides for enforcement both through standard default language and additional, creative means of facilitating the Charged Franchisees' continued compliance with the Act. *See, e.g.*, GC.Ex.Settlement 1 (paragraph entitled "Settlement Fund"), attached as Ex. 20. Further, McDonald's USA has committed to specific support of the remedies in the Agreement – and it is bound by the threat of default proceedings if it does not meet its obligations. *See id.* (paragraphs entitled "Performance" and "Settlement Fund" and Special Notice).

This relief – notice postings covering all allegations, mailing of notices to former store employees, rescinding of policies and rules alleged to be unlawful, full make-whole relief on all Section 8(a)(3) allegations, creative mechanisms to help facilitate future Charged Franchisee compliance – is more than reasonable for purposes of *Independent Stave*. Though "complete relief" is no longer the touchstone for NLRA settlements, *see UPMC*, 365 NLRB No. 153, at *1 (2017) ("we overrule *Postal Service*"), the agreements provide just that with respect to all

substantive allegations. The agreements do so notwithstanding the inherently uncertain nature of litigation, and the highly unlikely possibility that the General Counsel would have prevailed on all 176 merits claims at trial. *See UPMC*, 365 NLRB No. 153, at *7 ("It is never certain that the General Counsel will prevail on any complaint allegation, let alone all of them"); *see also Nat'l Tel. Servs*., 301 NLRB No. 1, at *7 (1991) (approving settlement, noting that "[t]he risk of litigation includes not only the risk of losing, but the loss of time in litigation"); *Monongahela Power Co.*, 1992 WL 1465777 (NLRB Div. Judges, Apr. 30, 1992) (approving settlement, noting that the alleged discriminatee "gets his money now" and that the settlement "avoids the risk that the General Counsel might fail to prove the violation"); *BE&K Constr. Co.*, 1992 WL 1465848 (NLRB Div. Judges, June 5, 1992) (approving settlement, noting that "[a]ny initial decision might be subject to lengthy appeals and perhaps a backpay or compliance proceeding").

Further, a joint employment finding against McDonald's USA – which would not be final for years and, at best, would involve fewer than 0.25% of the Company's franchisees – would not provide a bargaining order[25] or any other material addition to this relief. Tr. 21312:9-10 (General Counsel's statement that the settlement agreements provide "100 percent plus relief here, 100 percent plus"). Again, however, there is no guarantee that the General Counsel would obtain a joint employment finding even if this litigation continued until conclusion years from now. While the parties can agree to disagree on the strength of their respective cases, in McDonald's USA's view the General Counsel demonstrated only that the Company is a franchisor that takes legitimate (if not legally required) steps to protect its brand and that it provides franchisees with optional tools, resources and advice – all matters legally irrelevant to

[25] Neither the General Counsel nor Charging Parties sought a bargaining order in this litigation. *See* Tr. 21253:21-21254:1 (General Counsel); Tr. 21300:25-21301:10 (Charging Parties). In any event, they did not present evidence that would even remotely justify a bargaining order against any party.

joint employment status under the NLRA. *See Love's Barbeque Rest. No. 62*, 245 NLRB 78 (1978), *enf'd. in rel. part*, 640 F.2d 1094 (9th Cir. 1981). In any event, there can be no dispute that the General Counsel's chances of prevailing on his joint employment theory before the Board and the Courts are, at a minimum, uncertain.[26] *See Ochoa v. McDonald's USA, LLC*, 133 F. Supp. 3d 1228, 1241 (N.D. Cal. 2015) (rejecting joint employer claim); *Evans v. McDonald's Corp*., 936 F.2d 1087, 1089-90 (10th Cir. 1991) (same); *Cropp v. Golden Arch Realty Corp.*, No. 2:08-cv-96, at 18 (D.S.C. March 30, 2009) (same); *Mosley v. McDonald's Corp*., No. 05-CV-7290 (N.D. Ill. Dec. 06, 2006) (same); *Alberter v. McDonald's Corp.*, 70 F. Supp. 2d 1138, 1144 (D. Nev. 1999) (same); *Dotson v. McDonald's Corp.*, 1998 U.S. Dist. LEXIS 4676, at *8-9 (N.D. Ill. Mar. 31, 1998) (same); *Kennedy v. McDonald's Corp.*, 610 F. Supp. 203, 205 (S.D.W.Va. 1985) (same); *Whitfield v. McDonald's*, No. 08-118582-NO (Mich. Cir. Ct. July 28, 2010) (same); *Hall v. McDonald's Corp*., No. 84-270803 (Mich. Cir. Ct. June 22, 1986) (same). Further, the Board has announced that it is "considering rulemaking to address the standard for determining joint-employer status under the National Labor Relations Act." *See* https://www.nlrb.gov/news-outreach/news-story/nlrb-considering-rulemaking-address-joint-employer-standard (last visited August 13, 2018). Thus, even were the General Counsel to succeed at the trial level, at the Board, and on all appeals, that decision may have no precedential value – another litigation risk.

[26] The General Counsel concedes – as any reasonable prosecutor would – that the outcome of extended joint employment litigation is uncertain at best:

> [T]he uncertainty of the outcome is worth stressing. The General Counsel is confident in the strength of its case . . . General Counsel presumes, however, that McDonald's and franchisees are equally competent in their defenses. The point is regardless of the General Counsel's confidence he'd win, the outcome is uncertain. Even if General Counsel wins before Your Honor, the Board may take a different view of the evidence or the legal standard to apply to that evidence.

Tr. 21242:17-21243:3.

The stage of the litigation does not make the agreements any less reasonable. The Board and administrative law judges regularly approve settlements reached during trials or even after the conclusion of trials. *See, e.g.*, *Southeast Stevedoring Corp.*, 2014 WL 2422492, at *1 n.1 (approving settlement after parties "submitted…post-hearing brief[s]"); *APL Logistics*, 2008 WL 2128153 (NLRB Div. Judges, May 16, 2008) (approving "verbal settlement" during trial); *BE&K Constr. Co.*, 1992 WL 1465848 (approving settlement after "26 days of trial . . . close to 100 witnesses . . . more than 300 exhibits . . . and over 5,000 pages of transcript"); *Kimtruss Corp.*, 304 NLRB 1, 3 (1991) (approving settlement after the hearing closed, rejecting argument that "the element of judicial economy [was] absent"); *James Bros. Coal Co.*, 191 NLRB at 210 (noting authority to approve settlements even "after hearing or after findings have been made"). Here, the parties are more than five years into the case. The Board – unlike the Administrative Law Judge – has already correctly recognized that the case is nowhere near completion, absent settlement. *See UPMC*, 365 NLRB No. 153 at *5 n.7 ("Should it proceed all the way to finality, the McDonald's litigation could last for decades.").

Further, while the trial phase in the New York and Philadelphia Cases may be nearing completion, that is manifestly the wrong focus. *See UPMC*, 365 NLRB No. 153 at *5 (describing the entire gamut of the "lengthy litigation process," including "exceptions with the Board" and "court appeals," all of which can "consume[] substantial time and, too often, cause[] unacceptable delays before any Board-ordered relief becomes available to the parties"). After the completion of witnesses in the New York and Philadelphia Cases, the Charged Franchisees in the Severed Cases would submit Deferred Objections, and the parties would face months of briefing and years of appeals. Additionally, in the more than 50 Severed Cases – two-thirds of the total consolidated cases – again, the parties face all that and much more since no merits

witnesses have yet testified. An average of three witnesses per case would mean that the parties would present more than 150 additional witnesses before beginning months of briefing and years of appeals. The General Counsel summed up the situation correctly in his Motion to Stay Proceedings:

> Although the trial in this proceeding has extended for a very long period of time, allowing time for settlement discussions now will, if settlement is achieved, facilitate far more prompt and immediate remedial relief for the employees impacted by the alleged unfair labor practices. Continued litigation of this matter would likely result in issues remaining unresolved for years on appeal and potentially impede resolution of other cases outside of the scope of this proceeding. Finally, a global settlement would clearly save all parties vast additional expenses otherwise incurred from continued litigation of this matter.

Ex. 18, at 1-2; *see also UPMC*, 365 NLRB No. 153, at *13 (approving settlement that "eliminate[s] both the delay and the uncertainty" that would result from "years" of Board proceedings and court appeals).

3. The Settlement Is Not The Product of Fraud, Coercion, or Duress

The third *Independent Stave* factor favors settlement. *See Independent Stave*, 287 NLRB at 743 (whether there was "fraud, coercion, or duress . . . in reaching the settlement"). Even the Charging Parties concede as much. *See* Tr. 21297:25-21298:5 ("[w]e're not claiming that any individual discriminatees were necessarily defrauded by anybody"). In any event, there is absolutely no evidence of fraud, duress or coercion here. That is because none exists.

4. The Signatories Have No History of Act Violations or Settlement Breach

The final *Independent Stave* factor also favors settlement. *See Independent Stave*, 287 NLRB at 743 ("whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes"). As the General Counsel noted, "[t]here's no history of breached settlement agreements . . . [or] proven

or admitted violations of the [Act]" by either McDonald's USA or the Charged Franchisees. Tr. 21239:13-16.

B. The Judge's Contrary Conclusion Is Without Merit

In rejecting settlement, the Administrative Law Judge conceded that *Independent Stave*'s third and fourth factors favor settlement. *See* Order at 39-40. But the Judge withheld approval, noting that Charging Parties "vehemently oppose" the settlement, *id.* at 18, and the settlement does not "approximate the remedial effect of a finding of joint employment status," *id.* at 20. The Board should reverse.

1. The Judge is Wrong About the First *Independent Stave* Factor

The Administrative Law Judge claimed that the first *Independent Stave* factor was inconclusive. *See* Order at 19 ("I find that the parties' positons with respect to the proposed settlement do not militate in favor of approval"). Here, the Judge misconstrued the record and failed to provide any reasoned justification for her prioritization of the Charging Parties' position over the position of every other party and the alleged discriminatees.

First, the Administrative Law Judge erred in concluding that the positions of General Counsel and McDonald's USA are entitled to no "substantial weight" because there was no meeting of the minds between them. Order at 19. In her view, these parties "made contradictory representations on the record and in their Briefs regarding the Settlement Agreements' positons and McDonald's obligations." Order at 19. The purportedly "conflicting statements," the Judge claims, raise "significant doubt as to whether they have actually reached agreement." This is nonsense. The General Counsel, McDonald's USA, and the Charged Franchisees spent weeks in intense negotiation and they executed clear written documents. The Judge's *own descriptions* of key components of the settlement agreements make that clear. Order at 14-17. The signatories

to the settlement fully understand what they executed. The Judge's contrary view is based on a misreading of the record so transparent that it suggests outcome-oriented bias.

For example, the Administrative Law Judge contends that the General Counsel "appears to have significantly misunderstood the scope of McDonald's responsibilities under the default provisions." Order at 28. In reaching that plainly mistaken conclusion, however, the Judge ignores the General Counsel's motion for settlement approval, which accurately describes the Company's obligation in the event of a uncured breach by the Charged Franchisees. *See* 4/27/18 GC. Br. at 9 ("McDonald's is required . . . to cure any franchisee breaches by issuing 'Special Notices.'"), attached as Ex. 54; *see also, e.g.*, GC.Ex.Settlement 1 ("[I]n case of non-compliance with any of the terms of this Agreement by [Charged Franchisee] . . . the Regional Director . . . [w]ill . . . provide 14 day to McDonald's USA, LLC to mail the approved Special Notices . . . .") (paragraph entitled "Performance"), attached as Ex. 20. Similarly, the Judge also ignores the General Counsel's statements at the April 5, 2018 *Independent Stave* hearing, which were equally clear. *See* Tr. 21246:23-24 (describing the Company's duty to "mail the special notice"). Instead, the Judge relies on her *own gloss* on what the "General Counsel represented on March 19, 2018" – a date nearly a month prior to the *Independent Stave* hearing – on which the General Counsel provided a summary, oral description of the settlement. Order at 28. To say the least, that is not a legitimate basis to conclude that the highly experienced counsel for the General Counsel did not understand the provisions he negotiated and the agreement he signed.

The Administrative Law Judge also contends that "[t]he parties have made contradictory representations regarding the establishment and workings of the Settlement Fund." *Id*. The Judge contends that, at the April 5, 2018 *Independent Stave*, hearing McDonald's USA contradicted the General Counsel by "den[ying] that the company was 'coordinating

logistically . . . the contributions to and the operations of the settlement fund.'" *Id.* (citing Tr. 21318). This is another example of the Administrative Law Judge's disingenuous gloss on the record. In the very record passage the Judge cites, the Company accurately explained that McDonald's USA's issuance of Special Notice triggers payment, which is precisely what the settlement provides, *see, e.g.*, Gc.Ex.Settlement 1 (paragraph entitled "Settlement Fund"), attached as Ex. 20, and precisely what the General Counsel also indicated, *see* Tr. 21251-21253. The full text of the exchange between McDonald's USA and the Judge reads as follows:

> JUDGE ESPOSITO: Okay. But you are sort of coordinating logistically the operations of the contributions to and the operations of the settlement fund?
>
> MR. GOLDSMITH: Well, [the franchisees are] making the contributions and the Regional Directors are disbursing the funds. We don't have anything to do with it.
>
> JUDGE ESPOSITO: I'm sorry, I thought that the – I thought it was triggered by McDonald's providing the special notice.
>
> MR. GOLDSMITH: No, that was – McDonald's provides a special notice if the franchisee doesn't cure, if you will, on its own.
>
> JUDGE ESPOSITO: No, what I mean is that it says disbursement from the settlement fund to the alleged discriminatees will be triggered when McDonald's U.S.A. notifies the Regional Director that McDonald's U.S.A. will issue the special notice.
>
> MR. GOLDSMITH: Right and that directs the Regional Director to handle the funds and make a judgment about whatever the back pay is if that's what's at issue and all we do is say. . . what the facts were.
>
> JUDGE ESPOSITO: Okay. Thank you.

Tr. 21318:6-21219:3. Likewise, in their subsequently filed papers, McDonald's USA and the General Counsel each represented that the Company is responsible for collecting and delivering the Charged Franchisees' contributions to the Settlement Fund, as well as redistributing any remainder. *Compare* McD's 4/27/18 Supp. Br. at 11 ("McDonald's USA has already delivered

to the Regions the Charged Franchisees' contributions to the Settlement Fund, and the Company will be responsible for distributing the balance of the fund back to the Charged Franchisees"), attached as Ex. 53, *with* 4/27/18 GC. Br. at 9 n.23 ("McDonald's was obligated to collect and deliver the $250,000 being placed in the fund and has the responsibility for deciding whether and when to trigger any disbursement from the fund."), attached as Ex. 54.

Finally, the Judge claims that "General Counsel's description of McDonald's authority with respect to disbursements from the Settlement Fund as essentially discretionary . . . contradicts the Parties' statements describing such authority as mandatory in the context of the default process." Order at 29. There is no such contradiction. If a situation arises in which the Company has a contractual obligation to issue a Special Notice and trigger disbursements from the Settlement Fund, McDonald's USA indeed will have a choice to make: comply with the settlement agreement it negotiated and executed, or not comply with that agreement. If the Company chooses the latter, it risks default. *See* GC.Ex.Settlement 1 (paragraph entitled "Performance"), attached as Ex. 20. Once again, there is no such "discrepancy" and no "uncertainty." Order at 30. The Administrative Law Judge's contrary position reflects, however, a concerted and transparent effort to find no meeting of the minds when obviously there was one.

Second, the Administrative Law Judge's unwillingness to acknowledge the position of the alleged discriminatees is unreasonable given the refusal of the Charging Parties to provide any witness testimony or other evidence in support of their positions. The Judge acknowledged that three alleged discriminatees agreed to the settlement, but noted that "there is no evidence regarding the positons of the other 17 alleged discriminatees receiving backpay." Order at 18. True enough, but the consequences of that lack of evidence fall squarely on the Charging Parties.

When the parties first presented the settlement agreements to the Judge on March 19, 2018, Charging Parties affirmed that the alleged discriminatees were witnesses within their control, and they based their opposition, in part, on the supposed position of at least some alleged discriminatees. *See* Tr. 21201:2-6 (claiming that "[e]mployees had been coming to us telling us that they didn't know what they were giving up and so on"); Tr. 21202:15-22 (claiming that "we were scrambling, obviously, to get in touch with these workers" and noting a "Spanish speaking woman" who "didn't really seem to understand what had happened"). At the April 5, 2018 *Independent Stave* hearing, however, Charging Parties could not scrounge up even a single alleged discriminatee willing to testify that he or she preferred endless litigation to immediate, complete payment. The Judge is well aware of the adverse inference rule. *Compare Sparks Rest.*, 366 NLRB No. 97 at *1, *10 (2018) (affirming Judge Esposito's adverse inference "based upon a party's failure to call a witness within its control having particular knowledge of the facts pertinent to an aspect of the case"). She should have applied it here against the Charging Parties.

Third, the Administrative Law Judge's deference to the Charging Parties' position on whether to end this matter – over the opposing desire of the prosecutor and all other interested parties – not only reveals her bias, but is reversible error in and of itself. Regardless of whether Charging Parties "vehemently oppose approval of the Settlement Agreements," Order at 18, Congress assigned the General Counsel "authority . . . in respect of the prosecution of . . . complaints before the Board." 9 U.S.C. § 153(d). When he seeks to end a matter as prosecutor, deciding that the Act would be better served if he directed his office's limited resources to other matters, his discretion is particularly broad. He has the unlimited right to withdraw a complaint at least up to the point that "evidence on the merits has been introduced." *Boilermakers Union Local 6 v. NLRB*, 872 F.2d 331. 334 (9th Cir. 1988). His hand is not as free when it comes to

settlement, *see* NLRB Statements of Procedure, § 101.9(d), but when he wants to finally resolve a prosecution through reasonable settlement, his interests as prosecutor necessarily outweigh any contrary wishes of the charging party. *See Boilermakers Union*, 872 F.2d at 334 (concluding that, in continuing a case that the General Counsel seeks to end, "the ALJ must either severely compromise the prosecutorial independence of the General Counsel or in effect convert the proceeding into a two-party private litigation," results that are "inconsistent with Congress's clear intent"). The positions of the parties strongly favor settlement approval.

2. The Judge Erred in Assessing the Second *Independent Stave* Factor

The Administrative Law Judge next ran through a series of reasons why she believes the settlement is not "reasonable in light of the nature of the alleged violations, the inherent risks of litigation, and the stage of the litigation involved." Order at 20. Here, the Judge's misapplication of controlling precedent not only more than merits reversal, but it also once again suggests bias in favor of the Charging Parties' position.

a. *A Reasonable Settlement Need not Provide Full Relief on all Allegations*

The Judge fundamentally erred by requiring that a settlement provide essentially the same relief on all issues as a complete General Counsel victory, including on highly uncertain joint employment claims that would extend this litigation well into the next decade if not resolved. The Judge acknowledged that the settlement here provides "full back pay for the 20 alleged disciminatees, and even front pay for three employees . . . who were allegedly unlawfully discharged." Order at 39. Likewise, the Judge noted that the settlement provides for "the posting of a Notice in English and any additional language that the Regional Director determines to be appropriate." *Id.* at 14. Nevertheless, the Judge faulted the settlement because it does not "approximate the remedial effect of a finding of joint employment status." *Id.* at 20; *see also id.*

at 22 ("McDonald's obligations pursuant to the Settlement Agreements do not constitute anything approaching as effective a remedy as a finding of joint employer status."); *id.* ("McDonald's obligations . . . are not comparable in any way, shape, or form to joint and several liability"); *id.* at 32 ("[T]he obligations incumbent upon McDonald's . . . do not in any way approximate the remedial effect of a finding of joint employer status."); *id.* at 39 (acknowledging that the settlement "would result in immediate relief for the alleged discriminatees," but finding the "remainder of the proposed settlement . . . paltry and ineffective").

That is not an application of *Independent Stave*, but an attempt to circumvent the teachings of that case. For good reasons, the Board has rejected the position that "settlement must mirror a full remedy." *Independent Stave*, 287 NLRB at 742-43; *see also UPMC*, 365 NLRB No. 153 at *3 ("In *Independent Stave*, the Board made clear that the 'substantial remedy' factor was not to predominate over all other factors."). Unlike the Administrative Law Judge, the Board recognizes as a "reality of litigation" that settlement requires compromise, not complete capitulation by one party on every issue:

> Each of the parties to a non-Board settlement recognizes that the outcome of the litigation is uncertain and that he may ultimately lose; thus, the party in deciding to settle his claim without litigation compromises in part, voluntarily foregoing the opportunity to have his claim adjudicated on the merits in return for meeting the other party on some acceptable middle ground. The parties decide to accept a compromise rather than risk receiving nothing or being required to provide a greater remedy.

Independent Stave, 287 NLRB at 743. Rejecting compromise, on the other hand, subjects the parties to unwanted and unnecessary litigation, contrary to the purposes of the Act:

> When we reject the parties' non-Board settlement simply because it does not mirror a full remedy, we are consequently compelling the parties to take the very risks that they have decided to avoid, as well as depriving them of the opportunity to reach an early restoration of industrial peace, which after all is a fundamental aim of the Act.

Id.

In *Independent Stave*, the Board approved a settlement that "fail[ed] to provide for the posting of a notice." *Id.* at 740. Since then, cases applying its standards have approved any number of reasonable settlements that did not "approximate" full relief. *See, e.g.*, *U.S. Postal Ser.,* Case No. 7-CA-166361 at *1 n.1 (NLRB Order July 27, 2016) (finding that "the settlement agreement comports with the standards set forth in *Independent Stave*" despite the "absence of an enforcement mechanism"); *Mckenzie-Willamette Med. Ctr.*, 361 NLRB 54, 56 (2014) (settlement reasonable in Section 8(a)(5) information request case even though "Respondent [was] not immediately required to provide the requested information to the Union," it did not contain a "cease and desist" provision, and it did not "require the Respondent to post a remedial notice"); *Monongahela Power Co.,* 1992 WL 1465777, at *2 (NLRB. Div. of Judges Apr. 30, 1992) (settlement reasonable even though it lacked "a full remedy with a notice posting and a cease-and-desist order").

b. *Independent Stave Does not Remotely Require That McDonald's USA "Guarantee" Charged Franchisee Performance*

The Administrative Law Judge committed much the same error in concluding that settlement of a joint employer case is allowed *only* if the putative joint employer guarantees performance of the other parties to the case. *See* Order at 22-23 (objecting that McDonald's obligations are "not comparable in any way, shape, or form . . . to the guarantee of performance"). In support of this position, the Judge invoked *UPMC*, 365 NLRB No. 153 (2017). That case, as noted, reestablished *Independent Stave* as the controlling standard for settlements. *See id.* at *1 ("Today, we return to the Board's prior practice of analyzing all settlement agreements . . . under the reasonableness standard set forth in *Independent Stave*"). Additionally, it approved as reasonable a settlement in which a parent company guaranteed the

performance of a subsidiary. *See id.* at *7-*9. But nothing in it suggests that the Board intended to establish bright line rules regarding the content of particular settlements. *Compare id.* at *3 (concluding that it is "impossible to anticipate each and every factor that will have relevance"). Nor is there even a suggestion in that case that the *only* settlement that the Board would have found reasonable in *UMPC* was the one actually presented. *Compare id.* at *6 (noting that "a high jumper [who] clears the bar by a foot would also clear it if he had jumped 6 inches lower").

A comparison of the settlement here and the one in *UPMC* underscores these points. The settlement in this case is substantially *stronger*. The *UPMC* settlement did not provide any substantive remedies or end the overall litigation. While UPMC (the parent company) agreed to guarantee any eventual remedies in that case, it is "contingent" upon the outcome of subsidiary UPMC Presbyterian Shadyside's continuing objections to the underlying unfair labor practice claims. *UPMC*, 365 NLRB No. 153, at *10. Substantial litigation risk remains there because if the subsidiary is successful, UPMC's guarantee will amount to nothing. Here, by contrast, the settlement ends the litigation by providing full and immediate substantive relief. It also contains multiple provisions – not present in *UPMC* – that foster performance by the Charged Franchisees. These include, but are not limited to, provisions under which Charged Franchisees have already deposited funds to cover back pay obligations, default provisions applicable to the Charged Franchisees, provisions creating McDonald's USA's Special Notice obligations, and provisions related to the Settlement Fund. *See* GC.Ex.Settlement 1 (paragraphs entitled "Backpay," "Performance," "Settlement Fund," and Special Notice), attached as Ex. 20. To the General Counsel's credit, he achieved a better result in this case than he did in *UPMC*, particularly from the perspective of the alleged discriminatees. Rejecting this settlement because

it does not contain a guarantee has no basis at all in either *Independent Stave* or *UPMC* and turns both on their heads.

Even if the Administrative Law Judge were correct that *UPMC* established some sort of settlement template, and the Judge is not, the Judge failed to explain why that template would apply here.[27] This case involves joint employer allegations against a franchisor and its franchisees. *UPMC* involved "single employer" allegations against a parent corporation and its subsidiary. *UPMC*, 365 NLRB No. 153, at *1. As the Administrative Law Judge is well aware, single employer cases are subject to different legal standards and involve different legal risks than cases involving joint employer claims. *Compare Love's Barbeque Rest. No. 62*, 245 NLRB 78 (1978), *enf'd. in rel. part*, 640 F.2d 1094 (9th Cir. 1981) *with Alcoa Inc.*, 363 NLRB No. 39 (2015). Moreover, it is beyond dispute that parent corporations are inherently able to choose to control the terms and conditions of employment at subsidiaries, which is certainly not the case between McDonald's USA and its franchises.[28]

c. *The Prior General Counsel's Policy Objectives are Irrelevant Under Independent Stave*

Doubling down on her erroneous full-remedy and guarantee positions, the Judge points to the prior General Counsel's policy objectives in filing the Complaints underlying this litigation almost five years ago. *See* Order at 39 (noting that he wanted "a finding that McDonald's USA, LLC was joint and severally liable" and to "clarify the relationship between

[27] At most, the Judge faulted McDonald's USA for not "cit[ing] any other Board decision directly addressing a settlement in lieu of a finding of single or joint employer status." Order at 23 n.34. That, however, is not an explanation of how or why the structure of a single employer settlement is germane to the settlement of a joint employer case. Further, McDonald's USA did cite the controlling case as to settlement in the joint employer context: *Independent Stave*.

[28] In negotiations, McDonald's USA made clear that there would be no settlement if the General Counsel insisted on a guarantee. *See* Tr. 21317:16-21318:5 (noting that "we rejected" the concept of a guarantee). The Company is not a joint employer, it does not control terms and conditions of employment in franchisee restaurants, and it is in no position to somehow guarantee performance of independent franchisee business.

franchisor and franchisee in the context of Board law regarding joint employer status"). A settlement that does not fully achieve that "ultimate purpose" is unreasonable, asserts the Judge. *Id.* But, again, *Independent Stave* does not allow settlement only where one party or the other achieves everything it originally set out to accomplish. Rather, it encourages reasonable compromises that bring about industrial peace. *See Independent Stave*, 287 NLRB at 743 (allowing "compromises" in which parties "voluntarily forego[] the opportunity to have [claims] adjudicated on the merits in return for meeting the other party on some acceptable middle ground").

The Judge's position again usurps the General Counsel's prosecutorial duty to continually assess whether on-going litigation serves the purposes of the Act, regardless of when a matter began and/or who instituted it. *Cf. Boilermakers Union*, 872 F.2d at 334 (suggesting "that the General Counsel always exercises nonreviewable prosecutorial discretion when he withdraws a complaint because he no longer believes the evidence supports it"). Assessing both the status of this case and its expected length, the General Counsel has reasonably concluded that immediate and full relief on the underlying substantive allegations is preferable to a near-endless fight that may – or may not – effectuate a change in joint employment law years into the future. *See Emhart Indus. v. NLRB*, 907 F.2d 372, 376 (2d Cir. 1990) ("[R]emedies for unfair labor practices 'must be speedy in order to be effective.'") (quoting *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 181 (2d Cir. 1965), *cert. denied*, 384 U.S. 972 (1966)). The Board, similarly, has determined that "notice-and-comment rulemaking" is the more appropriate vehicle for assessing potential changes to joint employment law. *See* https://www.nlrb.gov/news-outreach/news-story/nlrb-considering-rulemaking-address-joint-employer-standard (last visited August 13,

2018). The Judge provides no explanation as to why the motives for launching this matter supposedly outweigh the General Counsel's current considerations.

d. *The Judge Improperly Discounts the Agreements' Settlement Fund and Special Notice Provisions*

With a slightly different take on the same theme, the Administrative Law Judge assails the agreements' Settlement Fund and Special Notice provisions as "paltry and ineffective." Order at 39. The Settlement Fund, the Judge claims, is "not a significant deterrent to future conduct or a meaningful remedial measure." *Id.* at 30. Similarly, the Special Notices are "insubstantial compared with the Notice typically required pursuant to standard NLRB informal settlement agreements." *Id.* at 31. The Judge once again misses the point. The settlement provides for robust notice posting to remedy the unfair labor practice allegations that underlie the complaints. *See* GC.Ex.Settlement 1-30 (paragraph entitled "Posting and Mailing of Notice" and approved Notice), attached as Exs. 20-49. The settlement contains standard default language to ensure compliance. *See* GC.Ex.Settlement 1-30 (paragraph entitled "Performance"), attached as Exs. 20-49. The Settlement Fund and Special Notice provisions are *additional* measures designed to foster compliance, and give McDonald's USA a role in supporting that compliance. *See* GC.Ex.Settlement 1-30 (paragraph entitled "Performance," "Settlement Fund" and Special Notice), attached as Exs. 20-49.

McDonald's USA believes that this is the first settlement that includes these additional compliance measures over and above the Board's standard default language. If the Judge is correct that the settlement is deficient because the *additional* measures do not go far enough, the Board should never have approved any prior settlement under *Independent Stave*.

e. *The ALJ Misapprehends the Stage of the Litigation and Litigation Risks*

The Administrative Law Judge faulted the timing of the settlement. *See, e.g.*, Order at 37 ("General Counsel's decision to pursue a settlement, and accept the Settlement Agreements literally days before the close of the monumental record in this case is simply baffling"); *id.* ("General Counsel decision to settle . . . without hearing the testimony of McDonald's expert . . . is incomprehensible"); *id.* at 38 (faulting the General Counsel for "continuing to pursue settlement" after the Board "vacated its decision in *Hy-Brand*"). While McDonald's USA does not dispute that it would have been preferable had this matter ended earlier, that is no basis for withholding settlement approval now.

As noted, the Board encourages reasonable settlement at *any* point in a case. *See* NLRB Casehandling Manual (Part One), Postcomplaint, § 10126.3 ("Settlement efforts should, of course, continue at all stages of the proceeding, including after the hearing opens."); *see also supra* at 24. All that is "baffling" and "incomprehensible" is not that the parties engaged in settlement talks, but the Judge's suggestion that this matter is near completion. It is years from completion. As the Judge's own orders make abundantly clear, the record is still open in the New York and Philadelphia Cases. The parties have not filed deferred objections, post-hearing briefs, exceptions to the Board, or appellate papers. In the Severed Cases, which constitute two-thirds of the cases involved in the settlements, the parties have not even put on a single merits witness. *See supra* at 24-25.

Equally erroneous is the Administrative Law Judge's treatment of litigation risk. She mentions it in passing, when dismissing the interests of the alleged discriminatees. *See* Order at 39 ("The effect of the uncertainty of litigation on the relief the alleged discriminatees would obtain through the proposed settlement is therefore not a compelling counterweight"). Leaving

aside the Judge's cavalier treatment of the wishes of the alleged discriminatees to receive immediate and full backpay, the General Counsel faces substantial litigation risk both as to his substantive claims and on the joint employment issue. *See supra* at 22-23, 23 n.26.

The Judge does engage in an extended discussion of *Capitol EMI Music,* 311 NLRB 997 (1993) and the General Counsel's allegation that McDonald's USA "coordinated and directed the activities of its franchisees' response to the Fight for $15 campaign." Order at 33-36. To the extent that discussion is intended to address litigation risk on the joint employment issue, it fails. It, however, does illuminate the Judge's prejudgment of the merits of this case – including of the Severed Cases that are two-thirds of the total consolidated cases in which the Judge has not heard any merits evidence at all.

First, the Administrative Law Judge concedes that the General Counsel "does not allege that McDonald's independently committed any unfair labor practices." Order at 33. While the Judge may be disappointed with former General Counsel Richard Griffin's decision not to charge the Company with violating the Act, because of that decision there is no possibility in this case that the Company will be found to have violated the Act. *See, e.g.*, *Roadway Express, Inc*., 355 NLRB 197, 201 n.16 (2010) ("The General Counsel controls the theory of the case, which the charging party is powerless to enlarge upon or otherwise change"), *enf'd*, 427 Fed.Appx. 838 (11th Cir. 2011); *Zurn/N.E.P.C.O*., 329 NLRB 484, 484 (1999) (refusing "to pass on either of the Charging Party's theories" of liability, which varied from the General Counsel's asserted theory, because it is well settled that a charging party may not "enlarge upon or change the General Counsel's theory of the case").

Second, *Capitol EMI* addresses a defense against shared liability that a company may assert *after* it has been found a joint employer. *See* 311 NLRB at 1001 ("Accordingly, we

conclude that [joint employer] Graham is not liable for Capitol's unlawful discharge of employee A.V. Harris."). The case is inapposite to the General Counsel's litigation risk in attempting to prove joint employment status in the first instance.

Third, despite the Judge's Order, McDonald's USA has no intention of converting this paper into a merits brief. Nevertheless, the Company vehemently disagrees with any suggestion that the General Counsel has demonstrated that it somehow directed or controlled the Charged Franchisees' response to the Fight for $15 campaign. The evidence overwhelmingly demonstrates that franchisees are responsible for the terms and conditions of employment in their restaurants, and McDonald's USA merely provides them with advice and optional resources that they may take or leave.[29] Franchisees control their own labor relations and their responses to the Fight for $15 campaign. Irrespective of the Administrative Law Judge's prejudgment of the merits of the joint employment issue, there is a substantial risk that the Board and the Courts will view the matter differently.

[29] *See*, *e.g.*, Tr. 14827:14-24; 14829:12-15; 14830:2-9 (testimony from Owner-Operator's store manager that he was "responsible" for "deciding how many people to employ"); Tr. 17362:4-24 (testimony from Owner-Operator that McDonald's USA has no involvement in "deciding whether [her restaurant] should use a particular employment policy"); Tr. 18149:3-20 (testimony from Owner-Operator's store manager that McDonald's USA played no role in his "decision to hire someone"); Tr. 18188:11-13 (testimony from Owner-Operator's store manager that McDonalds' USA had "no role" in the "day-to-day operations of [his] restaurant"); Tr. 18461:11-14 (similar testimony from Owner-Operator's store manager that McDonald's USA "didn't play any role" in "day-to-day operations"); Tr. 18667:4-21 (testimony from Owner-Operator that he alone "determined what wages to pay to employees"); Tr. 19365:11-18 (testimony from Owner-Operator's store manager that he did not "consult or discuss . . . employee discipline" or "employee termination" with McDonald's USA); Tr. 13456:6-23 (testimony from Owner-Operator that his restaurant does not use the "dynamic shift positioning tool"); Tr. 17292:5-25 (testimony from Owner-Operator that crew are positioned according to a restaurant-created "battle plan" and that McDonald's USA had no "role . . . in the creation" of the plan); Tr. 17376:11-21 (testimony from Owner-Operator that her store "did not" use the Dynamic Shift Positioning Guide because she considered it "one of the most useless pieces of paper McDonald's has ever designed"); Tr. 18190:16-19 (testimony from Owner-Operator's store manager that he had hired "maybe one" individual who submitted an application through Hiring to Win"); Tr. 18189:19-24 (testimony from Owner-Operator's store manager that he "never" used the "Hiring to Win interview guide"); Tr. 20029:20-20030:18 (testimony from Owner-Operator that she did not "implement RDM" because she found "it was too complicated, time consuming").

f. *The Judge's Fear That the Settlement will not Conclusively Resolve This Matter is Misplaced*

The Administrative Law Judge also argues that the settlement should be denied because the parties have vigorously litigated this matter. That is, the Judge suggests that the settlement cannot be approved because there may be disputes between the parties over agreement terms, given that the parties have disagreed over issues in the past. *See* Order at 2 ("[T]he parties' evident confusion and history of antagonism, virtually guarantee that the settlements will not definitively end the case"); *id.* ("[E]ven in the event that a genuine meeting of the minds exists the Settlement Agreements are not likely to definitively resolve the case, and will instead very possibly engender additional litigation").

The Judge's assertion is incorrect. The settlements are the product of extensive, complex, and good-faith negotiations. *See supra* at 13-14. Of course there is *some* risk that the parties could later disagree over the meaning or application of an agreement term. That is so with any settlement, especially a large and complex one. Ironically, the Judge's "solution" to this "problem" is to deny approval of the settlement and thereby *absolutely guarantee* that the parties will be embroiled in litigation for years to come.

g. *The Judge is Wrong on the Issue of Electronic Posting*

The Judge also contends that settlement is unreasonable because the agreements provide for physical posting and mailing of notices, but not electronic posting. *See* Order at 31-32. That does not make the settlement unreasonable. *See, e.g.*, *Independent Stave*, 287 NLRB at 740 (approving settlement that "fail[ed] to provide for the posting of a notice"). Even when cases are litigated to completion, the Board requires electronic posting only when "that is the customary means of communicating with employees." *J. Picini Flooring*, 356 NLRB No. 9, at *1 (2010). Here, there is no evidence of that. *See* Tr. 21243:23-21244:14 (statement from the General

Counsel that he considered, but did not include, electronic posting in the settlement because "there is no evidence" that the Charged Franchisees regularly communicated with employees through electronic means).

h. *The Judge's Position Regarding a Formal Settlement is Incorrect*

Similarly, the Judge finds that the settlement is unreasonable because it is an informal settlement, rather than a formal one. *See* Order at 25. Contrary to the Judge's suggestions, nothing in *Independent Stave* prohibits informal settlements after a complaint issues. To the contrary, it is well-settled that the General Counsel may enter into a reasonable informal settlement at any point. *See* NLRB Div. of Judges, BENCH BOOK § 9–410 (Jan. 2018 Wedekind ed.) (hereinafter "BENCH BOOK") (noting that "[e]ither type of settlement may be utilized at any time after a charge has been filed").[30]

i. *The Judge is Wrong About Successors and Assigns Language*

The Administrative Law Judge contends that the settlement is unreasonable because the agreements omit "the typical language binding a respondent's 'officers, agents, successors, and assigns.'" Order at 27. Nothing in *Independent Stave* requires this. Charging Parties themselves entered multiple settlement agreements in the Abeyance Cases, *see supra* at 7 n.9, that contain no such language. *Cf. UPMC*, 365 NLRB No. 153, at *12 n.14 (striking successors and assigns language, and finding charging party's argument regarding such language "abstract").

[30] The Administrative Law Judge suggests that a formal settlement is necessary because McDonald's USA and the Charged Franchisees are "repeat offenders." Order at 25. It is impossible to reconcile that assertion, an assertion having no basis in the record evidence, with her later, correct conclusion that "[t]he record does not establish . . . a history" of Act violations by any party. Order at 39.

j. *The Settlement Agreements are not Unreasonable Because They "Prematurely" Withdraw Complaints*

The ALJ claims that the settlement is unreasonable because it would have the General Counsel withdraw the Complaints prior to the completion of compliance. *See* Order at 26-27. *Independent Stave* does not dictate that a case must or even should remain open once a reasonable settlement is approved. The General Counsel was well within his rights to enter a settlement under which complaints are dismissed immediately upon approval, particularly when the settlement calls for a full substantive remedy *and* a number of steps associated with that remedy (such as delivery of funds to the Regions) have already occurred. *See* BENCH BOOK § 3–140 (noting instances in which "withdrawal of the complaint allegations [is] approved by the judge pursuant to approval of a settlement agreement").

3. The Administrative Law Judge's Conduct Throughout This Matter Underscores the Need for the Board to End it

Finally, the Administrative Law Judge devotes considerable pages in her Order to her perceptions[31] regarding McDonald's USA's litigation of this matter. *See* Order at 2-14. The Company has contested this matter zealously, but entirely appropriately. Contrary to the apparent positon of the Judge, that should not be surprising. This is not only one of the largest cases in the history of the Act, it implicates the structure of franchising and decades of settled

[31] Because they are immaterial to *Independent Stave*, McDonald's USA will not present a point-by-point refutation of the Judge's baseless criticisms of its approach to the litigation. As a representative sample, however, consider the Judge's assertion that McDonald's USA is the reason this case has not yet concluded. *See* Order at 12 ("McDonald's had deliberately prolonged the presentation of its case"). Nonsense. The Board recognized the scope and expected length of this case long ago, and it recognized that the Company was not to blame. *See McDonald's USA, LLC,* 362 NLRB No. 168 at *1 (2015) (Miscimarra, dissenting) (warning that this "large consolidated case" will involve "years of litigation"). The Company did not even begin its direct case in the New York and Philadelphia Cases until October 30, 2017, and since then it presented 15 witnesses over 14 trial days. *See* Order at 11, 37. As would any party in any matter, particularly a major matter, the Company and its lawyers based decisions regarding the presentation, order, and scope if its witness presentation solely on the evidence needed to rebut the General Counsel's case and the exigencies of the witness' schedules. But even if McDonald's USA had not put on a *single witness* in the New York and Philadelphia cases, this matter would still be years from completion. *See supra* at 11-13.

law. *See, e.g.*, *Love's Barbeque Rest. No. 62*, 245 NLRB 78 (1978), *enf'd. in rel. part*, 640 F.2d 1094 (9th Cir. 1981).

Unfortunately, a significant cause – if not principle cause – of the "history of antagonism" in this matter has been the Administrative Law Judge's mishandling of it. The Board has already reversed the Judge once. *See* Order at 13 (reversing the Judge's unprecedented order "require[ing] [McDonald's USA] to provide an expert's report"). In other instances – such as with the Judge's order on remote, videoconference participation and her unworkable consolidation order – the parties reached agreements to blunt the on-going impact of the Judge's errors. *See supra* at 9. Yet, the record still is littered with trial-management mistakes from the Judge – clear errors on subpoena issues, clear errors on admissibility issues, clear errors on constitutional issues – that would justify reversal by a Court of Appeals were this matter to be litigated to completion. *See, e.g.*, *McDonald's USA, LLC*, 362 NLRB No. 168 at *1 (2015) (Miscimarra, dissenting) (warning that this "large consolidated case" that would involve "years of litigation" could be reversed on procedural issues alone). Avoiding that very real risk is yet another reason that the Board should approve the settlement.

CONCLUSION

For the foregoing reasons, the July 17, 2018 Order Denying Motions to Approve Settlement Agreements should be reversed and the settlement agreements approved.

Dated: August 13, 2018

Respectfully submitted,

s/ *Willis J. Goldsmith*

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CERTIFICATE OF SERVICE

The undersigned, an attorney, affirms under penalty of perjury that on August 13, 2018, he/she caused a true and correct copy of McDonald's USA, LLC's Special Appeal of the Administrative Law Judge's July 17, 2018 Order Regarding Denying Motions to Approve Settlement Agreements to be electronically filed using the National Labor Relations Board's Internet website and to be served upon counsel for the Parties by e-mail at the following addresses designated for this purpose:

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